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Langdell's Legacy: Living with the Case Method

Russell L. Weaver

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1991]

LANGDELL'S LEGACY: LIVING WITH THE CASE METHOD

RUSSELL L. WEAVER*

TABLE OF CONTENTS

I.	DEVELOPMENT OF THE CASE METHOD	520
A.	<i>Langdell's Contribution</i>	520
B.	<i>The Case Method Assumes Dominance</i>	541
C.	<i>The Case Method Today</i>	543
II.	JUSTIFICATIONS FOR CONTINUED USE OF THE CASE METHOD	545
A.	<i>Desirable Context for Learning Law</i>	547
B.	<i>Teaching Students How to Read Cases</i>	549
C.	<i>Teaching Critical Analysis</i>	549
D.	<i>Developing Mental Toughness and the Ability to Think on One's Feet</i>	552
E.	<i>Learning Law in a System of Precedent</i>	553
F.	<i>Understanding the Legal Process</i>	553
G.	<i>Teaching Students About Lawyering</i>	558
III.	ARE THE JUSTIFICATIONS SOUND?	561
IV.	PROBLEMS IN IMPLEMENTATION	565
A.	<i>Casebooks</i>	566
B.	<i>Teaching Techniques</i>	574
C.	<i>Examinations</i>	576
D.	<i>Student Reaction</i>	578
V.	CAN THE DEFECTS BE REMEDIED?	580
A.	<i>Educating Students About Goals and Objectives</i>	580
B.	<i>Classroom Reinforcement</i>	583
C.	<i>Encouraging Independent Thought</i>	585
D.	<i>Examinations</i>	588

* Professor of Law, University of Louisville; B.A., 1974, J.D., 1978, University of Missouri. I wish to thank the following individuals who read and commented on this article: Dean Frederick Davis, Memphis State University, Cecil C. Humphreys School of Law; Professor Ronald Eades, University of Louisville School of Law; Dean Carl Monk, Deputy Director, Association of American Law Schools; Dean Steven R. Smith, Cleveland State University, Cleveland-Marshall College of Law; Dean Lee Teitelbaum, University of Utah College of Law; Professor Paul Weber, Chair, Department of Political Science, University of Louisville. I presented an earlier version of this paper at the Association of American Law Schools, Southeastern Conference, Annual Meeting, Nashville, Tenn. (Aug. 18, 1990).

(517)

VI. LIMITS OF THE CASE METHOD	591
VII. CONCLUSION	594

At present law schools are still primarily concerned with teaching law rather than educating men and women to be lawyers.¹

CHRISTOPHER Columbus Langdell introduced the case method of teaching at Harvard Law School in 1870 and dramatically altered the course of legal education in the United States.² His method, involving student examination of judicial decisions coupled with Socratic style analysis, ultimately gained widespread acceptance. Today, more than a century later, most faculty use the case method.³ Those who do not use the case method employ other methods, such as the problem method, that evolved from it. Most faculty continue, to varying degrees, to use Socratic questioning as part of that method.

Even though the case method has gained a high level of acceptance and use, it has always been subject to much criticism.

1. Leleiko, *Legal Education—Some Crucial Frontiers*, 23 J. LEGAL EDUC. 502, 504 (1971).

2. Discussions of the history of legal education in this country, including the development of the case method, include A. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* (1953); S. PRESSER & J. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 712-34 (2d ed. 1989); A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA* 112 (1921); R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (1983); McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U.L.Q. 597, 598 (1981); Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429, 448-53 (1981).

3. A. HARNO, *supra* note 2, at 137 ("There is general agreement among law teachers and substantial agreement among the members of the bar that case study is an indispensable phase of legal education."); see Blum & Lobaco, *The Case Against the Case System*, CAL. LAW., Mar. 1984, at 31; Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 224 (1974); Currie, *Materials of Law Study*, 3 J. LEGAL EDUC. 331, 332 (1951) ("Langdell's case method, with only minor modifications, still sets the pattern for instruction in almost every course in every accredited school."); Stein, *supra* note 2, at 452 ("[Langdell's method] still shapes legal education today."). In 1944, the Association of American Law School's Committee on Curriculum discussed the case method's importance to legal education: "Case-instruction is not only the most significant American contribution to legal education, but it is unrivaled as a machinery for basic training in analysis of holdings and in application of doctrine. . . . It is certainly a necessary part of future American legal education." ASS'N OF AMERICAN LAW SCHOOLS, 1944 HANDBOOK, 159, 166 (1945) (report of Committee on Curriculum) [hereinafter 1944 AALS HANDBOOK].

Students are often the most critical.⁴ They complain that the case method is an inefficient way to learn legal rules and that some faculty use the method poorly. More distressing, some students believe that faculty like the Socratic aspect of the method, in part, because it allows them to harass and intimidate students or to make themselves seem smart. The most cynical students view it all as a game. They even have names for these games: "hide the ball"⁵ and "how many angels can dance on the head of a pin?"⁶ As a result, many second-year and third-year students suffer disinterest and discontent.⁷

Many of these criticisms are well-deserved. Some faculty do teach poorly; a few are abusive. But many of the problems are attributable to the case method itself. The case method devel-

4. See Johnstone, *Student Discontent and Educational Reform in the Law Schools*, 23 J. LEGAL EDUC. 255, 255 (1970) ("The most obvious evidence that the law schools are in trouble is their principal constituency, their students. Widespread dissatisfaction among law students is threatening with obsolescence the way law schools are organized, how they teach, and much of what they teach."); see also A. HARNO, *supra* note 2, at 137 ("Case instruction, which since the time of Langdell has been the bone and sinew of American legal education, draws the weight of the criticisms [levelled at legal education]."); Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1064-65 (1986). In one commentator's opinion, the case method is "more a training for the memory than for the reason." Childs, *A Law Student's Criticism of the Case Method*, 26 THE GREEN BAG 103, 103 (1914), reprinted in Legal Ref. Services Q., Winter 1985-1986, at 119, 120. The student continues:

Most graduates of law schools are familiar with, and can give, the elementary principles of any branch of our law. But that same student, when confronted with a state of facts that vary in some degree from the broad rule as laid down by his text-writer, is lost. His not knowing the law that applies to a certain set of facts is not the sad feature of the situation, . . . but the fact that he does not know where to look for the law is pathetic.

Now for a suggestion. Would it not be better to give the student a set of facts, and require him to find a case whose facts ran parallel or were analogous with them, than simply to give him a case, with the law and facts all classified and ticketed, for his inspection?

Id. at 104, Legal Ref. Services Q. at 120.

5. Students believe that faculty try in this game to hide the legal issue and keep students confused. Faculty should not provide answers to student questions.

6. Students believe that faculty try in this game to make minute distinctions of law. These distinctions involve minor matters that bear no relation to law or reality.

7. See Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 778 (1941) ("[I]t is safe to state that the 'second-year drop-off' of interest continues, and that the 'third-year restlessness' is still with us, both of them on an impressive and disheartening scale."); see also A.B.A. Sec. Legal Educ. & Admissions B., *Conference on Legal Education in the 1980s* 62 (1982) (remarks of David R. Brink at conference in New York City, Nov. 12-14, 1981) ("[In] the third year of law school . . . theory has been learned and ennui often sets in.").

oped at a time when attitudes towards law were markedly different. Today, our attitudes have changed, but our methods have not sufficiently evolved. Langdell has been dead for nearly a century, but his ideas continue to influence us.

This article examines the case method of teaching as it is used in law schools in the United States. Attention is given to the history of the case method, its benefits, its shortcomings, and its impact on legal education. Finally, some suggestions for change are offered.

I. DEVELOPMENT OF THE CASE METHOD

A. Langdell's Contribution

Langdell assumed the deanship at Harvard in 1870 and introduced the case method that same year.⁸ There is some disagree-

8. A. SUTHERLAND, *THE LAW AT HARVARD* 161 (1967). Langdell got the position by default. When Langdell joined the faculty, it was extremely small: three professors of law plus instructors. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 496 (1920). The University decided that each unit should have a dean. Although the law faculty was willing to appoint one, there was some uncertainty about what a dean would do. Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518, 519 (1920). The one thing that was certain was that the two established professors, Washburn and Holmes, did not want the position. "The only candidate seemed to be Professor Langdell, who had only just come to the School; but Professor Langdell said nothing." *Id.* Langdell was elected.

Langdell had studied law at Harvard from 1851 to 1854 before practicing in New York City. A. HARNO, *supra* note 2, at 55. He did not develop a reputation as a trial lawyer. Indeed, he "did little court work," and far preferred the seclusion of the library. J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 261 (1950). He gained some notice as a lawyer because he "was often employed by leaders of the bar in the preparation of opinions, briefs, and pleadings." *Id.* He was a partner in a firm from 1858 to 1870, but even then "he continued to devote himself almost exclusively to the office and the library; he even set up his bedroom in connection with his law office." *Id.*; see *infra* notes 142-43 (discussing Langdell's approach to legal practice).

Langdell was selected for the Dane Professorship because of the impression he had made on Harvard President Eliot many years before. Eliot later recounted his impressions.

I remembered that when I was a Junior in College in the year 1851-1852, and used to go often in the early evening to the room of a friend who was in the Divinity School, I there heard a young man who was making notes to *Parsons on Contracts* talk about law. He was generally eating his supper at the time, standing up in front of the fire and eating with good appetite a bowl of brown bread and milk. I was a mere boy, only eighteen years old; but it was given to me to understand that I was listening to a man of genius.

In the year 1870, I recalled the remarkable character of that young man's expositions, sought him in New York, and induced him to become Dane Professor. So he became Professor Langdell.

2 C. WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* 360-61 (1970) (quoting Charles Eliot); see also A. HARNO, *supra* note 2, at 55-56; Batchelder, *Christopher*

ment about whether Langdell originated the method. Many believe that he did.⁹ There is evidence, however, that others had previously used the case method.¹⁰ Furthermore, there is some question about whether Langdell's decision to use the case method was entirely his own idea. One commentator has suggested that Langdell was influenced by the man who hired him, Harvard President, Charles W. Eliot.¹¹

Regardless of whether Langdell created the case method, his support for and use of that method had a profound and lasting impact on the course of legal education in this country. As Dean

Langdell, 18 THE GREEN BAG 437, 439 (1906); Parma, *The Origin, History and Compilation of the Casebook*, 14 LAW LIBR. J. 14, 15 (1921). A contemporary suggested that Eliot did not base the decision entirely on this recollection.

Undoubtedly this caused him to think of Langdell. But it should be said that before the appointment was made much time was spent and great pains were taken to obtain the fullest information about Langdell's work after he left the School and practiced law. Eminent professors, judges, and lawyers were conferred with.

Fessenden, *supra*, at 495.

There was doubt about whether Langdell could be confirmed. See Eliot, *supra*, at 518; Fessenden, *supra*, at 495. Indeed, when the appointment was announced, "[c]uriosity battled with astonishment." Batchelder, *supra*, at 437. Louis Brandeis noted that Langdell had not distinguished himself in the practice of law, as had his predecessor in the Dane Professorship, Story. Brandeis, *The Harvard Law School*, 1 THE GREEN BAG 10, 17 (1889) ("[T]wo men could hardly have differed more widely than Story and Langdell at the time each entered upon his duties as an instructor of law."). Whereas Story had a "national reputation" and "the University was honored when he accepted the professorship at the Law School," Langdell "was almost unknown." *Id.*; see Batchelder, *supra*, at 438 ("He was unknown to the Boston bar, though it was understood he had practised [sic] in New York City. He had held no public station. He had made few friends in Cambridge. And he had published no text-books!"). Moreover, opinions about the quality of Langdell's work differed. Fessenden, *supra*, at 495. Despite the concerns over Langdell's relative obscurity, in deference to Eliot the university confirmed his appointment on January 6, 1870. See Batchelder, *supra*, at 437; Eliot, *supra*, at 518.

9. See J. HURST, *supra* note 8, at 263; J. REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* 9 (1914); Leleiko, *supra* note 1, at 504.

10. A number of individuals are reported to have experimented with the case method prior to Langdell's implementation of it at Harvard in 1870. See A. HARNO, *supra* note 2, at 54 (Judge Zephaniah Swift of Connecticut reportedly published a treatise on evidence with appendix of cases as early as 1810); J. HURST, *supra* note 8, at 261 (John Norton Pomeroy of N.Y.U. School of Law reportedly gave a class which consisted of "reading assigned cases and participating in discussion of them in a small class under the lead of Pomeroy's questions. Pomeroy's approach was radically different from the prevailing text-and-lecture method.").

11. Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 334-35 (1979) (outlining Eliot's educational theories, published before 1870, and suggesting similarity of Langdell's theories); see also J. REDLICH, *supra* note 9, at 16.

of the Harvard Law School, he had the opportunity "to shape the whole program of a leading school to a new technique, and thence both to redirect and to warp the course of law training in the United States."¹² Langdell seized that opportunity and radically altered legal education.¹³

Langdell's method involved a fundamental departure from existing teaching methods. In Langdell's day, law schools were still in an early stage of development. Many continued to receive their education by the apprenticeship system.¹⁴ Law schools did

12. J. HURST, *supra* note 8, at 261.

13. See J. REDLICH, *supra* note 9, at 9; Ames, *Professor Langdell—His Services to Legal Education*, 20 HARV. L. REV. 12, 13 (1906) (Langdell's case method was a "revolution . . . in the mode of teaching and studying law."); Currie, *supra* note 3, at 331 (Langdell's introduction of case method one of "certain veritably epochal events" in history of American legal education); Fessenden, *supra* note 8, at 493-94 (case method "radically different from any previously in use").

While this is certainly the prevailing view, not everyone agrees that Langdell's method amounted to a revolution in legal education.

The advent of Langdell and the case method in the early 1870s, far from being a "dramatic and revolutionary movement" that "ushered in a new era of legal education," is more accurately viewed as the culmination of an era in which a narrow model of legal education had gradually gained predominance. If Langdell can be said to have ushered in a new era of legal education at all, it is only because he and his successors at Harvard gave academic respectability to a model of legal education that originally was adopted largely as a matter of practical necessity.

McManis, *supra* note 2, at 598; see also G. GILMORE, *THE AGES OF AMERICAN LAW* 42 (1977) ("Langdell's idea evidently corresponded to the felt necessities of the time. . . . [I]f Langdell had not existed, we would have had to invent him.").

14. See A. HARNO, *supra* note 2, at 18-50; J. REDLICH, *supra* note 9, at 7, 18-19; R. STEVENS, *supra* note 2, at 3; Landman, *The Problem Method of Studying Law*, 5 J. LEGAL EDUC. 500, 501 (1953); Stein, *supra* note 2, at 439-40 ("The predominant method of legal education was the clerking system, although . . . some students went to England and were admitted through the Inns of Court. Five signers of the Declaration of Independence and six members of the Constitutional Convention obtained their legal education in this manner.") *id.* at 444-45 ("The training of the clerk was essentially akin to the training of the blacksmith's apprentice; it was practical rather than theoretical."). "[L]ong periods of clerkship were commonly prescribed, and substantial fees were paid for the privilege of serving the apprenticeship under lawyers of established reputation." Currie, *supra* note 3, at 344; see also McManis, *supra* note 2, at 600-06; Stein, *supra* note 2, at 440.

The quality of education varied dramatically. Some jurisdictions required no formal study; others made graduation from college a condition of apprenticeship. New York and Boston required graduation from college plus an apprenticeship. See Currie, *supra* note 3, at 344. Other jurisdictions allowed those who had attended college to serve a shorter apprenticeship. *Id.*; see also A. REED, *supra* note 2, at 112. In any event, it was assumed that practitioners would provide the necessary professional training. See A. REED, *supra* note 2, at 113; Currie, *supra* note 3, at 344.

The apprenticeship itself might involve an academic component, but it would often entail nothing more than the reading of some legal treatise or commentary such as *Coke on Littleton* or *Blackstone's Commentaries*. This system was

not even exist in the United States until the end of the eighteenth century, and they did not become popular until the end of the nineteenth century.¹⁵ At the early schools, students were taught

often unsatisfactory and at times barbaric. Justice Story recalled that, when he began his apprenticeship, he was handed a copy of Coke and told to read it. He related that "after trying it day after day with very little success, I sat myself down and wept bitterly. My tears dropped down upon the book and stained its pages." Story, *Autobiography*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 20 (W. Story ed. 1852). Daniel Webster had been apprenticed to a lawyer who believed that students should read the most difficult works. A. HARNO, *supra* note 2, at 20. Webster later stated his disapproval of this approach:

A boy of twenty, . . . with no previous knowledge of such subjects, cannot understand Coke. It is folly to set him upon such an author. There are propositions in Coke so abstract, and distinctions so nice, and doctrines embracing so many distinctions and qualifications, that it requires an effort not only of a mature mind, but of a mind both strong and mature, to understand him. Why disgust and discourage a young man by telling him he must break into this profession through such a wall as this?

Everett, *Biographical Memoir of the Public Life of Daniel Webster*, in 1 *THE WORKS OF DANIEL WEBSTER* xxviii (11th ed. 1858); see also A. HARNO, *supra* note 2, at 19-21; J. REDLICH, *supra* note 9, at 7; Smith, *The Study of Law by Cases: A Student's Point of View*, 3 AM. L. SCH. REV. 253 (1913); Stein, *supra* note 2, at 440.

The apprenticeship method survived in most jurisdictions at the beginning of this century. See J. REDLICH, *supra* note 9, at 7; A. REED, *supra* note 2, at 47 ("It is no more necessary here than it is in England for those who wish to be admitted to practice to take any law school work, if they can in other ways secure the preparation needed to pass the professional examination."). But there were problems with the system. See Landman, *supra*, at 501 (law offices inadequate to provide satisfactory training "because of conflicts between the master lawyer's demands and the requirements of the apprenticed clerk-students, and because of the discursive procedure of reading law reports in a law office for preparation for the practice of the law").

15. The early law schools in this country were founded as proprietary schools. The first is believed to have been the Litchfield School of Law, which was founded in 1784 by Tapping Reeve, later Chief Justice of Connecticut and author of a treatise on domestic relations. See J. REDLICH, *supra* note 9, at 7; Brandeis, *supra* note 8, at 11; Clark, *Some Thoughts on Legal Education*, 12 AM. U.L. REV. 125, 127 (1963); Proceedings of ABA Section of Legal Education Annual Meeting (Aug. 22, 1894), reprinted in 17 REP. A.B.A. 351, 395 (1894) [hereinafter Proceedings] (address of section chairman Henry Wade Rogers). See generally M. McKENNA, *TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL* (1986) (colorful account of persons involved in founding of school). But see A. REED, *supra* note 2, at 45 (Litchfield not first law school, but "first law school of national reputation that taught students from all parts of the country"). Litchfield students did outside reading and attended lectures. More than 1000 students attended during the school's 50-year existence, and many went on to illustrious careers. See A. HARNO, *supra* note 2, at 28-32 (Litchfield produced 101 members of Congress, 28 U.S. Senators, three U.S. Supreme Court Justices, six cabinet members, 34 state supreme court justices, 14 state governors, and 10 lieutenant governors); see also Brandeis, *supra* note 8, at 10-11; Proceedings, *supra*, at 395 (address of Henry W. Rogers). The second law school was located at Northampton, Massachusetts, and was also a proprietary school. See Brandeis, *supra* note 8, at 11. There is some dispute on this point. Compare A. REED, *supra* note 2, at 44 (William and Mary Law School was founded in 1779) with A. HARNO, *supra*

by the lecture method.¹⁶ This method took varying forms. Some

note 2, at 23 (William and Mary did not formally open school of law in 1779, but rather had simply created chair in law).

The study of law at universities, as opposed to proprietary schools, did not begin until somewhat later. Ezra Stiles, in 1777, proposed the establishment of a professorship of law at Yale, where he was President, but his proposal was never implemented. See Currie, *supra* note 3, at 350; Stone, *Some Phases of Legal Education*, 5 AM. L. SCH. REV. 389, 390 (1924). Instead, universities took an incremental approach, beginning with the establishment of chairs in law. The first chair, established at William and Mary College by Thomas Jefferson and initially filled by George Wythe, was dedicated to the study of "Law and Police." See A. HARNO, *supra* note 2, at 23; Stein, *supra* note 2, at 441-42. Other universities soon established chairs as well. See R. STEVENS, *supra* note 2, at 4; Brandeis, *supra* note 8, at 11; Currie, *supra* note 3, at 350 ("In 1790 James Wilson was appointed professor of law at the College of Philadelphia. In 1793 James Kent was appointed professor of law at Columbia. Finally, in 1799, Transylvania University appointed George Nicholas . . . [as] 'Professor of Law and Politics.' "); McManis, *supra* note 2, at 609.

It was not until the nineteenth century that universities expanded beyond chairs in law and established law schools. The first, Harvard Law School, began in 1817. Proceedings, *supra*, at 396 (address of Henry W. Rogers). Yale Law School began in 1824, by taking over a proprietary school, and the Virginia law school began the next year. Proceedings, *supra*, at 396 (address of Henry W. Rogers); see also A. HARNO, *supra* note 2, at 37-38; Stone, *supra*, at 391. These early law schools could not be described as stunning successes. During "the first twelve years of its existence, the Harvard Law School averaged less than nine students a year, and the few who enrolled attended irregularly." A. HARNO, *supra* note 2, at 40. This situation changed in 1829 with the appointment of Mr. Justice Story as the first Dane Professor of Law at Harvard. *Id.* at 40-50; see also Stone, *supra* note 15, at 391. Enrollment immediately jumped to 24 students, and by 1844 (the year before Story's death) had reached 163. A. HARNO, *supra* note 2, at 47.

The number of law schools grew steadily over the next few decades, but most offered only a one-year course of instruction. See *id.* at 51 (15 law schools in 1850, 21 in 1860, and 31 in 1870); Thayer, *supra* at 173 (only two schools offered two-year curriculum). The law school movement gained strength with the advent of the ABA in 1878. See Proceedings, *supra* at 391-93 (address of Henry W. Rogers) (72 law schools in 1894, of which 65 were associated with universities). The number of those pursuing a law school education increased dramatically as well. A. HARNO, *supra* note 2, at 82 (1611 students in 1870, 7600 in 1894); see also Stone, *supra*, at 390. By the beginning of the twentieth century, most lawyers accepted the notion that their successors should be trained in academic institutions. See Proceedings, *supra*, at 394 (address of Henry W. Rogers) ("[W]e are no longer obliged to debate the question whether a Law School is a better place than a law office in which to study law.").

16. See J. REDLICH, *supra* note 9, at 7; Brandeis, *supra* note 8, at 11-16; Morse, *Changing Trends in Legal Education*, 11 OR. L. REV. 39, 41 (1931-32). At very early law schools, instruction often involved nothing more than an expanded form of apprenticeship training. See J. REDLICH, *supra* note 9, at 38; see also Currie, *supra* note 3, at 356; Kenny, *The Case Method of Teaching Law*, 16 J. SOC'Y COMP. LEGIS. 182, 184-85 (1916); Stone, *supra* note 15, at 391. At the Litchfield school, lectures were given as well. See J. AMES, LECTURES ON LEGAL HISTORY 354, 362 (1913); cf. Currie, *supra* note 3, at 357 (Litchfield operated "on the narrow basis of an extension of the idea of practitioner training, quite without the benefit of academic connections.").

Henry Wade Rogers described early teaching methods in an 1894 address.

The great question which interests legal educators to-day is as to

law schools used a "text and lecture" method, whereby students were asked to read "texts" or other learned discussions as a prelude to attending lectures.¹⁷ Columbia pioneered the "Dwight method,"¹⁸ which included student recitations in conjunction with the lecture method.¹⁹ Under the various versions of the lec-

methods of instruction. The first method used was that of lectures. Mr. Justice Wilson lectured in the University of Pennsylvania as did Chancellor Kent at Columbia. Story and Greenleaf and Parsons lectured at Harvard. The lecture system was in the early days a matter of necessity as there were no books suitable for the student to use.

Proceedings, *supra* note 15, at 404 (address of Henry W. Rogers). George Wyeth of William and Mary lectured, but he also "held practice courts in the Virginia state capital." Stein, *supra* note 2, at 442.

17. J. REDLICH, *supra* note 9, at 7; Proceedings, *supra* note 15, at 404 (address of Henry W. Rogers) ("The text-book system of instruction came next [after the lecture system] and last of all the case system."); see Kenny, *supra* note 16, at 185. Until instructors began writing their own texts, students commonly studied Blackstone's *Commentaries*. See Landman, *supra* note 14, at 501.

18. Parma, *supra* note 8, at 16; see also J. REDLICH, *supra* note 9, at 8. The "Dwight" in the title referred to Theodore W. Dwight of the Columbia Law School. Proceedings, *supra* note 15, at 404-05 (address of Henry W. Rogers).

19. See J. REDLICH, *supra* note 9, at 8; Landman, *supra* note 14, at 501. Dwight's method was described in the following manner:

In a lecture he would summarise [sic] and criticise [sic] some thirty pages of Blackstone; and then, on the next lecture day, after the men had worked through these pages at home, an hour would be devoted to questions. The students were questioned in the alphabetical order of their names, starting on each day from the name last reached at the last questioning; so that no one could escape being tested. Dwight would comment freely on their answers, and sometimes spend several minutes in giving the correct answer to a question that had proved difficult. No oratory was attempted: he never raised his voice, he used no gestures, he sat still in his chair. But there was no desk or table to impede his hearers' full view of him; his voice was peculiarly clear; every sentence was lucid; and every point was driven home. Beyond all this, there was in the old man that rare gift of personal magnetism which is the secret of successful oratory.

Kenny, *supra* note 16, at 185-86.

William G. Hammond, Chair of the ABA's Committee of Legal Education, noted that the Dwight method took a variety of forms.

This [method] appears to be the foundation of instruction in a large majority of the schools, though it is used in very few, not more than four or five, as the sole method of instruction, being generally combined with lectures and the reading of cases. In some schools the recitation is supplemented by a lecture on the subject of the lesson, by the instructor, who comments on, explains and amplifies the text. In many of the schools a colloquy or discussion by the students directed by the professor is practiced, as a part of the exercise, in which the students analyze the subject, compare the authorities and criticise [sic] the author, etc., and in some this is the principal method of instruction. In a large number of schools, cases illustrating the text selected from the notes or from recent decisions are referred to the students, and a recitation in some form upon them is required. In general, cases are said to be used to illustrate a principle or show its historical development.

ture method, cases were not entirely ignored. Faculty would lecture about them, and texts would discuss them.²⁰ Langdell's "case method" was quite different.²¹ He did not lecture students about the meaning of judicial decisions.²² Instead, he asked students to read decisions and to decide for themselves what the de-

Hammond, *Proper Course of Study for American Law Schools*, 26 AM. L. REV. 705, 705 (1892).

By the 1890s, the case method had replaced the Dwight method, even at Columbia. The change was not well received by some. "The change at Columbia was strongly felt and indeed caused as big a revolution as had that at Harvard. As a result a new school [New York Law School] with a faculty of former Columbia teachers was organized for the purpose of continuing the Dwight method of instruction." Parma, *supra* note 8, at 16. But, even at the New York Law School, the case method ultimately replaced the Dwight method. See Brook, *A Comment on Style: The Elevator as Metaphor*, 30 N.Y.L. SCH. L. REV. 547, 548 (1985).

20. See Proceedings, *supra* note 15, at 375 (remarks of Simeon E. Baldwin) ("Is there any law school which . . . does not make large and systematic use of cases in instruction? I venture to say there is none, and . . . from the beginning of legal education in this country. . . cases were used, though sparingly, for the purpose of instruction as well as of illustration.").

21. Franklin G. Fessenden, a first-year student at Harvard in 1870, summarized the lecture method as it was used at Harvard in that year.

Some of the professors and lecturers literally lectured, that is, read from textbooks or prepared notes, pausing occasionally to make some explanation, and infrequently to answer questions asked by courageous students. A few lecturers gave out in advance the subject of the particular lecture, and talked not only to, but once in a great while with, the learners.

Fessenden, *supra* note 8, at 498.

Fessenden, who was in Langdell's first case class, summarized the differences between the case and lecture methods.

[With the lecture method] [i]t was assumed that the author of the textbook had examined the subject and had found out the true rules of law relative thereto. Thus the rules were given. There was little, if any, examination made, outside the textbooks from which the instructor read, by the students with the purpose of ascertaining how the rules originated or why they existed. It was assumed that these rules were right. Thus it was a process of absorption. One stout advocate of this system said, "Professor — and his book fairly exude law. We take in and assimilate it." The result of the method of Langdell was active search and inquiry; that of the other professors was passive absorption. One produced work and constant discussion outside the lecture room among the students; the other, acquiescence in what was read by the lecturer. One excited earnest inquiry; the other produced a feeling of satisfaction in hearing the rule announced. On the one hand, accuracy of thought and expression were encouraged, tending to clear perception of sound distinctions and to the discovery by the student of the principles involved. On the other hand, acceptances of the conclusions of some one who announced the law was the expected and acceptable result.

Fessenden, *supra* note 8, at 500.

22. See Batchelder, *supra* note 8, at 440; Chase, *supra* note 11, at 337-78; Fessenden, *supra* note 8, at 498-99.

cisions meant.²³

Langdell's interest in the case method stemmed from his beliefs about law. Langdell viewed law as a "science"²⁴ and believed that it should be studied by scientific methods.²⁵ In his view, sci-

23. See J. REDLICH, *supra* note 9, at 12-13; Brandeis, *supra* note 8, at 19; Clark, *supra* note 15, at 127; Fisher, *The Teaching of Law By the Case System*, 36 AM. L. REV. 416, 417 (1888); Kenny, *supra* note 16, at 187; Stevens, *Legal Education: The Challenge of the Past*, 30 N.Y.L. SCH. L. REV. 475, 475 (1985); Wambaugh, *Professor Langdell—A View of His Career*, 20 HARV. L. REV. 1, 2 (1906). As one of Langdell's contemporaries observed, "The distinctive feature of the case system is not the exclusive use of cases, but that the reported cases are made the basis of instruction." Keener, *The Inductive Method in Legal Education*, in *Proceedings*, *supra* note 15, at 473, 487 (emphasis in original) (paper read at annual meeting).

24. Address by Dean Langdell, Harvard Law School Association (Nov. 5, 1886), *reprinted in* 2 C. WARREN, *supra* note 8, at 374; *see also* A. HARNO, *supra* note 2, at 56; J. HURST, *supra* note 8, at 262; 2 C. WARREN, *supra* note 8, at 361; Batchelder, *supra* note 8, at 438; Brandeis, *supra* note 8, at 19; Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1304 (1947); Grey, *Langdell's Orthodoxy*, 47 U. PITT. L. REV. 1, 5 (1983) ("Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts, which it was the task of the scholar-scientist like himself to discover."); Keener, *Methods of Legal Education*, 1 YALE L.J. 143, 148 (1892) (judicial decisions are legal experiments, reports are records of such experiments); Landman, *supra* note 14, at 502; Stein, *supra* note 2, at 449. There is debate about what Langdell meant when he called law a "science." Compare G. GILMORE, *supra* note 13, at 42 ("The jurisprudential premise of Langdell and his followers was that there is such a thing as the one true rule of law which, being discovered, will endure, without change, forever.") with Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 2-5 (1951) (Langdell's statement not to be taken literally).

25. See Batchelder, *supra* note 8, at 439; Frank, *supra* note 24, at 1304; Landman, *supra* note 14, at 502; Stein, *supra* note 2, at 449-50; Wambaugh, *supra* note 23, at 2. Langdell was a product of his times. Many believed that law was susceptible to scientific analysis. See A. HARNO, *supra* note 2, at 61-62 ("[T]he student must look upon law as a science consisting of a body of principles to be found in the adjudged cases, the cases being to him what the specimen is to the geologist.") (quoting W. KEENER, A SELECTION OF CASES ON THE LAW OF QUASI-CONTRACTS v-vi (1895)); J. REDLICH, *supra* note 9, at 16; Fry, *Some Aspects of Law Teaching*, 9 LAW Q. REV. 115, 127 (1893); Hammond, *supra* note 19, at 707; Keener, *supra* note 23, at 475; *Proceedings*, *supra* note 15, at 394-95 (address of Henry W. Rogers); Tiedeman, *Methods of Legal Instruction*, 1 YALE L.J. 150, 153 (1892) (one should "use the cases not for the purpose of learning directly from them what is the law, but to discover, as the scientific investigator hopes by his experiments with the forces of nature, the fundamental principles underlying the concrete manifestations of their influence."). Hurst, in his analysis of the development of American law, explained the growing faith in science within the legal education community.

Fundamental change in legal education went naturally with the drift of law business [sic] and of main currents of thought in the United States after 1870. . . . Events now demanded of the bar knowledge and skills not within the sonorous phrases of the "constitutional lawyer" of mid-century or the black-letter learning of the conveyancer. . . . [N]ew problems brought a pressure for more thorough and rigorous intellectual training in the law. This happened at a time when people were acquiring a great faith in "science"; to raise the standards of legal edu-

entific method involved an examination of "original sources"²⁶—the printed reports of cases.²⁷ Students were expected to study these cases in an effort to uncover the fundamental rules and principles of law.

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.

cation fitted this temper. Dispassionately collecting, analyzing, classifying their materials, inducing therefrom certain laws to explain the order inherent in the world and to guide men in accommodating themselves to it—the natural sciences were viewed even by learned men with undiscriminating enthusiasm, as the model for the study of all phenomena. Why not, then, for the study of law?

J. HURST, *supra* note 8, at 260-61.

26. See Batchelder, *supra* note 8, at 439; Frank, *supra* note 24, at 1304; Stein, *supra* note 2, at 449; Wambaugh, *supra* note 23, at 2. Langdell's views were summarized by then Harvard President Eliot in 1894. After commenting on how he hired Langdell, Eliot notes that Langdell

then told me, in 1870, a great many of the things he has told you this afternoon: I have heard most of his speech before. He told me that law was a science: I was quite prepared to believe it. He told me that the way to study a science was to go to the original sources. I knew that was true, for I had been brought up in the science of chemistry myself; and one of the first rules of a conscientious student of science is never to take a fact or principle out of second hand treatises, but to go to the original memoir of the discoverer of that fact or principle.

2 C. WARREN, *supra* note 8, at 361 (quoting Eliot). Others questioned the accuracy of this view of science. See Tiedeman, *supra* note 25, at 153 ("If . . . [one] wants to learn what is already known about . . . [a] science[], he goes to the treatises in which are recorded the results of the investigations of others. . . . He goes to his library, instead of to his laboratory.").

27. See J. HURST, *supra* note 8, at 262; see also A. HARNO, *supra* note 2, at 55-56, 58; Batchelder, *supra* note 8, at 439; Brandeis, *supra* note 8, at 19; Stein, *supra* note 2, at 449-50. Professor Keener, in a report to the ABA Section of Legal Education, described the relationship between the case method and the methods of natural science.

If the authority of treatises and text-books is derived from the cases, then the treatises and text-books must be derivative, while the cases are the original sources. . . . It has been suggested, in opposition to the case system, that a student in natural science would not be expected to study simply by examining a specimen without any further explanation. . . . [But] [u]nder the approved methods of to-day, the student [of natural science]. . . . uses both a laboratory and a library. Now the case is, to the student of law, both a laboratory and a library. The facts of the case correspond to the specimen, and the opinion of the court announcing the principles of law to be applied to the facts correspond to the memoir of the discoverer of a great scientific truth, and constitute the library.

Keener, *supra* note 23, at 476-77; see also Fessenden, *supra* note 8, at 498.

Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases . . .²⁸

Langdell may have had an ulterior motive for viewing law as a "science": it provided a justification for the existence of law schools. Early law schools struggled for their survival against skeptics who viewed law as a craft and believed that law could best be learned by apprenticeship. Many believed that it was entirely inappropriate to teach this craft in a university setting.²⁹ These attitudes were not new. Blackstone had previously encountered them in his unsuccessful effort to establish a college of law at Oxford.³⁰ But Langdell's view of law as a science altered the debate. If law really was a science, then it deserved serious academic study. James Bradley Thayer, one of Langdell's colleagues and contemporaries, outlined the nature of the debate when he re-

28. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (1871); see also A. HARNO, *supra* note 2, at 57; Batchelder, *supra* note 8, at 439; Brandeis, *supra* note 8, at 19; Parma, *supra* note 8, at 15.

29. See T. VELEN, *THE HIGHER LEARNING IN AMERICA* 211 (1918) ("[T]he law school belongs in the modern university no more than a school of fencing or dancing."); Schlegel, *Langdell's Legacy, or the Case of the Empty Envelope*, 36 *STAN. L. REV.* 1517, 1517 (1984). Because of these views, many continued to receive their training as apprentices rather than in law schools. A. HARNO, *supra* note 2, at 39. Moreover, many believed that apprenticeship was the best way to learn law. See J. HURST, *supra* note 8, at 264 (legal education nothing more than mastering of craft, skills for which have to be passed on from practitioner to novice); Currie, *supra* note 3, at 344 ("In this country also legal education was regarded generally as training in an art, to be acquired by apprenticeship—a conception which is unfriendly to the thesis that higher learning is essential.").

Doubts about whether law should be studied in a university setting came from within the academic community itself. See Currie, *supra* note 3, at 356 ("[T]he founders of the early American professorships were confronted with the same necessity which Blackstone had experienced, of justifying to a hostile academic world the inclusion of law in the college curriculum . . ."). Faced with these attitudes, early law schools struggled to survive. See *id.* at 360-61 (detailing difficulties at Harvard during first 12 years and at University of Virginia). This view of law "as a craft" affected the composition of early faculties, which primarily consisted of active practitioners and judges. William G. Hammond, then chairman of the ABA Committee on Legal Education, stressed this feature in an 1892 article.

THE LAW SCHOOLS IN THIS COUNTRY ARE IN GOOD HANDS. As a rule, the instructors are lawyers engaged in active practice. Most of them are men of the best position at the bar of their respective communities, many of them are men of national and international distinction. There are a great many judges, State and national, including three judges [sic] of the Supreme Court of the United States, engaged in teaching.

Hammond, *supra* note 19, at 713; see A. HARNO, *supra* note 2, at 39.

30. Thayer, *supra* note 15, at 170-71.

marked, "If our law be not a science worthy and requiring to be thus studied and thus taught, then, as a distinguished lawyer has remarked, 'A University will best consult its own dignity in declining to teach it.'"³¹ Langdell, the "distinguished lawyer" being quoted, stated further, "If it [the law] be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it."³² Langdell vociferously argued that law was a "science" worthy of being taught at a university.³³

31. *Id.* at 173; see Keener, *supra* note 23, at 475 ("If law is a science—and if it is not a science it has no place in the curriculum of a university—all will agree that the most scientific method should be adopted in teaching law."). Thayer also noted:

Especially we must not be content with a mere lip service, with merely tagging our law schools with the name of a University, while they lack entirely the University spirit and character. What, then, does our undertaking involve, and that conception of the study of our English system of law, which, in Blackstone's phrase, "extends the pomoria of University learning and adopts this new tribe of citizens within these philosophical walls"? It means this, that our law must be studied and taught as other great sciences are studied and taught at the Universities, as deeply, by like methods, and with as thorough a concentration and life-long devotion of all the powers of a learned and studious faculty.

Thayer, *supra* note 15, at 173.

32. Address by Dean Langdell, Harvard Law School Association (Nov. 5, 1886) reprinted in 2 C. WARREN, *supra* note 8, at 374. Long after Langdell's time, some still questioned the propriety of teaching law in a university setting. Robert Maynard Hutchins recalled one skeptic.

I asked a member of the New York bar, who has achieved some distinction at it, a classmate of mine in the law school, what he had got out of his legal education. He was at a loss for an answer. I then asked him what he thought the student should get out of a legal education. He finally said, "The most important qualification for success at the bar is guile. A university cannot and should not teach guile. Therefore a university should not teach law."

Hutchins, *Legal Education*, 4 U. CHI. L. REV. 357, 361 (1937).

33. See Address by Dean Langdell, Harvard Law School Association (Nov. 5, 1886), reprinted in 2 C. WARREN, *supra* note 8, at 374. In addition to claiming that law was worthy of university study, Langdell argued that it necessarily had to be studied in the university.

If it [law] be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it. Again, law can be learned and taught in a university by means of printed books. If, therefore, there are other and better means of teaching and learning law than printed books, or if printed books can only be used to the best advantage in connection with other means—for instance, the work of a lawyer's office, or attendance upon the proceedings of courts of justice—it must be confessed that such means cannot be provided by a university. But if printed books are the ultimate sources of all legal knowledge; if every student who would obtain any mastery of law as a science must resort to these ultimate sources; and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him—then a uni-

In addition, Langdell's position helped him respond to those who questioned his decision to hire teachers with little or no practical experience.³⁴ If law was a "science" and not a "craft," it need not be taught by active practitioners.³⁵

Langdell faced practical problems in implementing his method. How could he give students access to the cases? Students could be sent to the library to read cases on their own, but Langdell viewed that solution as impractical. There were too many cases. Moreover, Langdell did not believe that it was necessary for students to review all or even most of the cases on a given subject. On the contrary, he thought that a systematic review would be detrimental because the vast majority of cases were of no value.³⁶ Students should only review "sound" or "good" decisions—as selected by their professors. Langdell solved his problem by creating a casebook containing selected cases that were worthy of examination.³⁷

versity, and a university alone, can furnish every possible facility for teaching and learning law.

Id.

34. See Batchelder, *supra* note 8, at 441; Beale, *James Barr Ames—His Life and Character*, 23 HARV. L. REV. 325, 326 (1909); Chase, *supra* note 11, at 338; Eliot, *James Barr Ames*, 23 HARV. L. REV. 321, 321-22 (1910) (Langdell appointed Ames "due to the fact that Ames had been his best pupil while he was introducing his case system of instruction into the Law School.").

35. Langdell justified his approach in the following manner.

[A] teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often travelled it before. What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law.

J. HURST, *supra* note 8, at 263-64 (quoting Langdell without attribution); see Batchelder, *supra* note 8, at 439 ("[Law] must be taught by men who have so studied it, irrespective of their practice of it—as geology is better studied on the hillside than in the parlor, and better taught by a geologist than by a stone mason."); Fessenden, *supra* note 8, at 512 ("[A] successful practitioner would not necessarily be a successful teacher, any more than a successful teacher must prove to be a successful practitioner. In fact, they were two distinct professions. [Langdell] considered himself a teacher of the principles of law."); see also Eliot, *supra* note 8, at 520-21; Thayer, *supra* note 15, at 174-75.

36. See C. LANGDELL, *supra* note 28, at vi; see also A. HARNO, *supra* note 2, at 58; J. REDLICH, *supra* note 9, at 11; Kenny, *supra* note 16, at 186.

37. C. LANGDELL, *supra* note 28, at vi; see Kenny, *supra* note 16, at 187; cf. Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 SW. L.J. 903, 906-09 (1988) (proliferation of casebooks edited by American professors, especially in area of contracts, followed Langdell's publication).

Langdell had not yet published this casebook in his first year at Harvard. A student later recalled how Langdell remedied the lack of text.

There was great curiosity as to what he would do. It was generally believed that his was to be a new method. But no one had any conception

In addition to creating casebooks, Langdell redefined the professor's role. Instead of lecturing, professors should employ the "Socratic method" to guide students in their consideration of judicial decisions.³⁸ Langdell would ask students to "tell what the facts were, how the litigation developed, what point was at issue, what the court had decided, and the court's reasoning."³⁹ Langdell would then solicit the students' opinions and reactions to the

what it would be until the students were given, in advance of the lecture, sheets which contained reprints of cases, the headnotes omitted, selected from various reports. As he followed Lord Coke's *melius petere fontes quam sectari rivulos* the first selections were taken from old reports. The sheets for the civil procedure course contained early forms of pleading, in Latin. The latter excited many forcible comments. Some asked why they were not given extracts from ancient tablets. On the appearance of the cases and forms the proposed system was condemned in advance by practically all.

Fessenden, *supra* note 8, at 498. Stein describes Langdell's ideas about casebook preparation as follows:

The casebook developed by Langdell purged the social sciences from the law courses, and covered only a few major topics in contracts. All of the important English and American cases developing a principle of law appeared chronologically in a rather slow moving, often repetitive and irresistible manner. The second edition of the Contracts casebook had summaries prepared by Langdell that stated what today's students would call black letter law. Because these were thought to be too helpful to the students they were excluded from later editions and other casebooks prepared at Harvard.

Stein, *supra* note 2, at 450.

38. See Proceedings, *supra* note 15, at 378 (remarks of Amasa M. Eaton). Eaton explained the "Socratic method" as he understood its use in 1894.

It seems to me, Mr. Chairman, that perhaps the term 'Case System' is in itself rather unfortunate. Would it not be better to distinguish it as a Socratic method? for that seems to be the distinguishing mark—I had almost said the distinguishing excellence—of that system of teaching law. I have studied under both systems. Let me explain what I understand by the Socratic system. Certain cases are given out the day beforehand, and the students have time to look them over. They come in with a certain amount of study upon those cases. Mr. A. is called upon: "Will you state the case of Brown v. Jones?" He states it. That teaches him how to group and state accurately facts which in itself is a very important element in a lawyer's career. He is then asked, perhaps, "Mr. A., do you agree with the case? If so, state why." Mr. A. then states that he either does or does not agree with it, and states the ground for his belief. The professor then calls upon some one who is of the opposite mind, and some other student states his reasons for his dissent. In that way the class room is immediately divided, and it is like the trial of a case in court. When both sides have finished, the teacher sums up, and then, perhaps, announces his opinion. The result is, as it seems to me, that the principles which have been illustrated, will forever remain fixed in their memories. It is not because they have read them in some books, but it is because they have been brought out of themselves. That seems to me to be the highest form of education.

Id.

39. A. SUTHERLAND, *supra* note 8, at 179; see J. REDLICH, *supra* note 9, at 12.

cases.⁴⁰ Finally, Langdell would inquire as to "whether the case followed others which the class had read, or was inconsistent; whether it could be 'distinguished'; and so on."⁴¹

Langdell's method was not well received. Criticism came from all constituency groups: colleagues,⁴² students⁴³ and promi-

40. See A. SUTHERLAND, *supra* note 8, at 179.

41. *Id.*; see Brandeis, *supra* note 8, at 20.

42. See Kenny, *supra* note 16, at 187; Parma, *supra* note 8, at 15; Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. LEGAL EDUC. 167, 169-70 (1986) ("The [case] method was received by the greater part of Langdell's colleagues as an 'abomination.'"); Wambaugh, *supra* note 23, at 3. Professor James Bradley Thayer joined the Harvard Law faculty in 1874, when debate was raging about the soundness of Langdell's methods. Thayer noted a conversation from that year.

Mr. Dana detained me yesterday in his office to speak of the Law School. He made free criticisms on Langdell's method of teaching—particularly as applied this term to Equity, and dwelt upon the advantages, in his judgement of the method of going over such books as Blackstone & Kent with the students and giving them a general view of the whole ground. I confessed that I agreed with him—both he and I making, however, the qualification that we had not yet "heard the other side,"—"a useful thing to do," as he said! . . . So far as I am able to judge I cannot think as Langdell does about his method. Let it be admitted that the knowledge acquired by a bird's eye view is superficial; it does not pretend to be profound or minute.

Howe, *The First Law School Lecture of James Bradley Thayer*, 2 J. LEGAL EDUC. 1, 2 (1949) (quoting memorandum by Thayer, Apr. 25, 1874).

43. The news that Langdell was going to use a new method attracted much interest. A student later described Langdell's first class.

The subject was Contracts. While it was a beginner's course, most of those who had been over the subject during the preceding year felt drawn to the lecture. The attendance was unusually large. It filled the room. Langdell began[. . .] by questioning students about the case of *Payne v. Cave*. After the preliminary inquiries as to the facts, arguments and opinions had been made, further questions were put to draw out the views of the students as to the arguments, and opinions. At first it was almost impossible to get much expression; for it was evident that very few had studied the case critically, and had no thought of forming any judgement of their own. And so as question after question was put, all presupposing a careful examination into the various aspects of the case, the answerers for the most part said that they were not prepared. The new men generally had not studied law at all. . . . By far the greater number openly condemned the new way. They said there was no instruction or imparting of rules, that really nothing had been learned.

Fessenden, *supra* note 8, at 498-99 (footnote omitted); see also Batchelder, *supra* note 8, at 440; Kenny, *supra* note 16, at 187; Parma, *supra* note 8, at 15; Wambaugh, *supra* note 23, at 3.

There was some positive reaction. Many students, including some who did not like Langdell's method, recognized that the method had some value. Fessenden, *supra* note 8, at 507. In addition, "there were a few who felt that a quickening of their zeal, who were certain that they had received an impulse, who insisted that they got 'something which somehow lasted,' as one of them, since famous at the bar, expressed it." *Id.* at 500.

nent members of the bar.⁴⁴ Some criticized the redefinition of the professor's role. They believed that professors should state their own opinions rather than solicit students' opinions.⁴⁵ Langdell's colleagues were equally skeptical. Many declined to adopt his new method and continued to lecture.⁴⁶ Students were often

44. See Brandeis, *supra* note 8, at 19; Kenny, *supra* note 16, at 187-88; Parma, *supra* note 8, at 15; Stein, *supra* note 2, at 451 ("[M]embers of the bar feared that the innovations at Harvard of selecting non-judges as professors, coupled with Langdell's case method, would doom the law school. . . . This fear so motivated some members of the Boston bar that they caused the founding of the Boston University Law School to continue the old lecture-textbook method."); Stevens, *supra* note 24, at 479-80; Wambaugh, *supra* note 24, at 3; see also Keener, *supra* note 24, at 146.

Batchelder later recounted the reaction of many members of the legal community.

Teach law by cases? Preposterous; also unheard-of! Some folks might practice law that way; no one could teach it! Besides it would never do to bring the methods of the office into the lecture room. Moreover, the cases were obscured by countless extraneous facts and confusing details. The law, pure and undefiled, was not in them.

Batchelder, *supra* note 8, at 439. Keener catalogued (and dismissed) the primary criticisms of those members of the bar who opposed Langdell's method: (1) that it "may make men academically learned in the law as a science, but will not make lawyers"; (2) that it "taught [students] to regard law as a mere aggregation of cases"; (3) that it "requires of a tyro work which can be done only by a qualified critic or writer"; (4) that it "proceeds on the theory that law is an exact science, . . . [but] such is not the case"; (5) that it "proceeds upon the study of old cases to the exclusion of modern cases"; (6) that it treated "only the unsettled points of law"; and (7) that it required examination of every case decided on a point. Keener, *supra* note 23, at 482-87.

45. See Dwight, *Columbia College School of Law, New York*, 1 THE GREEN BAG 141, 149 (1899); Keener, *supra* note 23, at 488 ("One occasionally . . . hears the objection raised to the case system that it does not make the study of law easy for the student, and . . . that the province of the teacher is to teach."). Professor Keener responded to these criticisms by noting:

We admit that the system does not proceed on the idea of "the law made easy." We believe the law to be a difficult science which can be made easy only at the expense of thoroughness, and, therefore, at the expense of the student. We believe that the information which the student receives should be the result of thought and effort on his part. As Mr. Gray has well expressed it, "The greatest teacher the world has ever known was fond of comparing himself to a mid-wife. His task, he said, was to aid the scholar to bring forth his own ideas. He, to-day, will be the most successful teacher who can best exercise this obstetrical function. And in law no better way has yet been devised to make the student work for himself than to give him a series of cases on a topic and to compel him to discover the principles which they have settled and the process by which they have been evolved."

Keener, *supra* note 23, at 488 (quoting Gray, *Cases and Treatises*, 22 AM. L. REV. 756, 763 (1888)).

46. Stein noted:

The introduction by Langdell of a new teaching method had no immediate effect on his colleagues who still used the textbook system that had developed after Story's death. Assigned portions of a text would be read in class, with the instructor making any comments or citing any

quite critical. They viewed the new method as "chaotic."⁴⁷ They were accustomed to lectures,⁴⁸ which they found "continuous, logically arranged [and] doctrinal."⁴⁹ Many students questioned whether they were "learning law" in Langdell's class,⁵⁰ and they openly showed their displeasure. Once, when a student cornered Langdell in a classroom exchange, the class erupted with boos

cases that he felt illuminated the subject. A student might occasionally ask a question or, even more rarely, *mirabile dictu*, the whole class might engage in a general discussion. It was accepted that the text writer had mastered the cases and "had found out the true rules of law relative there to." This was the expected instructional method when the goal of going to law school was the accumulation of the largest number of legal principles that could be remembered.

Stein, *supra* note 2, at 450 (quoting Fessenden, *supra* note 8, at 500); *see also* Brandeis, *supra* note 8, at 21; Fessenden *supra* note 8, at 498 ("[T]he method of instruction had been for years by lectures. In the year 1870-71 this was generally the case.").

47. A. SUTHERLAND, *supra* note 8, at 179.

48. *See id.*; Wambaugh, *supra* note 23, at 2.

49. A. SUTHERLAND, *supra* note 8, at 179.

50. Langdell's "first lectures were followed by impromptu indignation meetings.—'What do we care whether Myers agrees with the case, or what Fessenden thinks of the dissenting opinion? What we want to know is: What's the Law?' " Batchelder, *supra* note 8, at 440; *see* Stein, *supra* note 2, at 450 ("[Langdell's] nonplussed students felt they had come to be taught the law, and not to teach the professor.").

One of the students in Langdell's class summarized student reaction. The new men generally had not studied law at all. It seemed to them the height of presumption to have, and much more to express, an opinion. It was to learn rules of law that they had come to the School. When they had accomplished this they might have some right to state their views. They thought it absurd to undertake to give their thoughts about a subject of which they knew nothing. . . . Older students said they theretofore had received something, even though in a preliminary way, from professors and lecturers, but here was an entire absence of anything but a seeking of expressions of opinion from youths who were ignorant of what they talked about; that no rule or suggestion of any rule of law had been hinted at; that certainly it was no way to learn law, for the law was not in the idle talk of these young boys; that the performance was foolish; that Langdell acted as if he did not know any law; that it would be more profitable to attend other lectures where something could be learned.

Fessenden, *supra* note 8, at 499.

Many questioned how long it would take to learn law by Langdell's method. It was said that a half hour's perusal of a textbook would yield more information than could be obtained by several weeks' talk, mostly by the students themselves, in the lecture room It was predicted that Langdell's course on Contracts could not be finished in two years, that one half could not possibly be gone over in a year; whereas the courses of the other professors and lecturers could plainly be gone over with ease within the allotted time.

Id. at 501. Many students questioned whether Langdell knew the law as well as other professors. When he was asked a question, he was usually hesitant to reply, and he usually responded with a question. *Id.*

and claps.⁵¹ After this incident, many stopped attending Langdell's class. Eventually, only a few faithful students remained.⁵² Concerns about Langdell's method were reflected in Harvard's enrollment, which by the 1872-1873 academic year declined substantially.⁵³ Many, especially alumni, were concerned about the law school's future.⁵⁴ They believed that Langdell's case method

51. A. SUTHERLAND, *supra* note 8, at 179. Fessenden, who was in the class, later described the incident.

On one occasion one of the students who was a steadfast admirer and follower of the new way succeeded in eliciting an immediate answer to a question. After receiving the answer he put several more questions with a skill which it is doubtful whether he has surpassed in his subsequent distinguished career. Langdell was routed. There was violent applause from the greater part of the class. Dust arose in considerable quantities from the settee cushions, which were vigorously used in the demonstration. This occurred at the last of the hour. At the end there was much excitement and expressions of sentiment among the students who had applauded, who said that Langdell had been caught like a small boy—that no law could be learned in such a course and from such a man, who plainly did not know the law.

Fessenden, *supra* note 8, at 501; see Batchelder, *supra* note 8, at 440 ("Young Warner, a keen logician (and one of the first converts to the new system) cornered him squarely one day, amidst a hurricane of derisive clapping and stamping.").

Fessenden ultimately viewed this incident as, in some respects, a triumph for Langdell: "Not many appreciated the treat given them; and very few saw that it was a sincere pleasure to him that the students should study the subject so carefully as to be able to put such pregnant questions." Fessenden, *supra* note 8, at 501. Batchelder also noted that few students could appreciate the incident as evidence of the method's success. "Would it be believed, 'the old crank' went back to the same point the next day and worked it out all over again! Most of the class could see nothing in his system but mental confusion and social humiliation. They began to drop away fast." Batchelder, *supra* note 8, at 440.

52. A. SUTHERLAND, *supra* note 8, at 179-80; see also Beale, *supra* note 34, at 325; Fessenden, *supra* note 8, at 500; Parma, *supra* note 8, at 15; Stein, *supra* note 2, at 451. Students gravitated to classes being taught by the lecture method. See Batchelder, *supra* note 8, at 440; Fessenden, *supra* note 8, at 503 ("[O]ther teachers had large numbers, [Langdell had] extremely few. The contrast was painful.").

53. Fessenden, *supra* note 8, at 510 ("[D]uring the three years of his administration the number had steadily decreased until it had reached the lowest point since 1851-52, save in 1861-62 and 1862-63, two of the years of the Civil War."); see also 2 C. WARREN, *supra* note 8, at 430; Chase, *supra* note 11, at 338.

54. The situation, especially the small number of students attending Langdell's classes, "caused alarm." Fessenden, *supra* note 8, at 504.

To say that the university authorities, the alumni, and the friends of the School were alarmed is a mild expression of the feelings of those who had the interests of the school at heart. It was commonly thought that there should be a change in the administration and in the way of teaching; that teaching by cases should be given up and a more liberal—as it was termed—mode adopted in its stead. Again, it was urged that in the future a combination of the textbook and a few cases with much less discussion should be the basis.

Id.

was an experiment that had failed.⁵⁵

Despite the criticism, Langdell did not alter his beliefs or his method.⁵⁶ He believed that he was correct and saw no reason to change. Some university officials were less confident, but they resisted calls to dismiss Langdell.⁵⁷ There had been some signs of success. Some students liked Langdell and his method,⁵⁸ and

55. See Fessenden, *supra* note 8, at 504 ("[S]uch was the well-nigh universal opinion among lawyers, professors, and students."); *id.* at 510 ("The result of the long and patient trial of Langdell's system, instead of giving assurance of a fresh and vigorous life for the School, indicated rather a gradual approach toward its end. . . . [I]t was indeed bold if not reckless to continue longer the Langdell method.").

56. Franklin G. Fessenden, a student at Harvard at that time, explains Langdell's attitude.

During the vacation interval between the end of the year 1870-71 and the beginning of the next, there was much discussion as to whether a method better than that followed by Langdell, and also better than that of the other professors and lecturers, could not be adopted. It was conceded at length that there was some good in Langdell's way, although at the same time it was asserted that there was greater good in the other ways. Combination of the two methods was urged At the opening of the School year 1871-72 some adopted this intermediate or, as it was sometimes called, combination method, and some adhered to the old. There was much interest in what Langdell would do. Those who had thought that he would modify his method were disappointed. He made no change. This was attributed pretty generally to obstinacy; for it was felt, notwithstanding the enthusiasm of his followers, that the past year had demonstrated the folly of his way. He persisted, and indeed at no time made any modification whatever of his method of teaching, until in later years he was compelled to do so by reason of failing eyesight.

Fessenden, *supra* note 8, at 507; see Batchelder, *supra* note 8, at 441 ("Keenly as Langdell's nature suffered under each new blast of discouragement his invincible perseverance . . . carried him through. . . . Sensitive but undeviating as the compass-needle amidst impending shipwreck, he went straight forward. He knew he was on the right track."); Fessenden, *supra* note 8, at 505-06 ("He sought only the true solution, and when he had arrived at a conclusion, whether with reference to his method of teaching or dealing with a law question, he adhered to it tenaciously, even in the face of apparent pecuniary loss to the School or severe condemnation for himself.").

Nevertheless, Langdell's method met with greater success. "Langdell's lectures proceeded in the same way as before, but with increased interest, questioning, and discussions; the students were encouraged to form their own conclusions, being always advised to study court opinions given in the reports. The questions were squarely met." Fessenden, *supra* note 8, at 508. Yet, "[v]ery few indicated their preference for Langdell and his way," and in 1872-73 the "general opinion of bench, bar, and students was still hostile to Langdell's method." *Id.*

57. See Fessenden, *supra* note 8, at 510 ("It took courage to decide to go on in this losing way, but most fortunately that decision was made and carried out. And contrary to the wishes of most of the sincere friends of the School, the announcement was made accordingly, prior to the beginning of the year 1873-74.").

58. See also Batchelder, *supra* note 8, at 440-41 ("A little group, the ablest

these included some very good students who showed much intellectual fervor.⁵⁹ Langdell's saviour was President Eliot, who believed that Langdell's ideas were fundamentally sound and actively defended the case method—much more so than Langdell

men of the class. . . —'Kit's freshmen' they were dubbed—discerned there was something here better than the text-book lectures, and stuck to the ship."). Some of Langdell's most ardent supporters formed "a new club, the Pow Wow, which met weekly and held discussions and moot courts." Stein, *supra* note 2, at 451; see Fessenden, *supra* note 8, at 504-05; see also Ames, *supra* note 13, at 13.

There were other signs of success as well. During the first year, as Langdell persisted with his method, some students who had deserted his classes began to return to them. One of Langdell's students recalled:

But just after the middle of the year a strange thing happened. The attendance at his lectures began to increase,—slightly at first, to be sure, but it was a gain which grew larger slowly but surely. Those who returned became more and more interested as they continued their renewed attendance. Toward the end of the year quite a number, yet considerably less than half of those in the School, were present, and participated in the exercises now sometimes called "investigations." It should be added that these, having caught the spirit of the course, remained constant, and became strong advocates of the system. It was interesting to observe that they inquired about what had been done on in their absence and sought the privilege of reading and in many instances copying the notes of those who had attended all of Langdell's lectures.

Fessenden, *supra* note 8, at 504; see also Stein, *supra* note 2, at 451. This return was prompted, in part, by "[t]he success of the members of the Pow Wow and their enthusiasm [which] finally infected at least some of the other members of their class." Stein, *supra* note 2, at 451. Despite these encouraging signs, the general attitude was still negative: Langdell's method was viewed as "impracticable and impossible." Fessenden, *supra* note 8, at 506. Even during the next year, the number of students who attended Langdell's classes was smaller than the number who attended the other classes, although it was "larger than during the year before." *Id.* at 508.

59. See Fessenden, *supra* note 8, at 516; Stein, *supra* note 2, at 452. The students who remained in Langdell's class strongly supported his method. One of these students stated:

As time passed, fewer and fewer remained in Langdell's lectures. The number dwindled to seven or eight. But these were enthusiastic and persistent. They had no doubt as to the benefits derived. They argued the questions raised early and late, before and after the lectures. Some of the other students pronounced it a noisy nuisance. The library was sought by them to an unprecedented extent. They were never satisfied. It was said they criticized the opinions in actual court decisions "in a most disrespectful way"

But Langdell's followers were persistent in their course. The talks between these few and the many others, during the intervals between the lectures, were frequent and earnest. When asked why he so decidedly preferred the new way, one of these disciples replied that he felt freer, stronger, and better; that he got something which he found nowhere else; that there was no need to waste time in attending the reading of textbooks; that he had long before learned to read, and it was not necessary for him to go to a law school to have some one read to him; that he received more and had a keener interest in the Langdell way.

Fessenden, *supra* note 8, at 503.

himself did.⁶⁰ This support enabled Langdell to resist internal and external criticism until Harvard's enrollment returned to normal levels.⁶¹ Ultimately, the new method was successful.⁶² Langdell's pupils turned out to be effective lawyers,⁶³ and they were sought out by employers.⁶⁴

60. Eliot later explained Langdell's attitude. "[Langdell] knew that there was only one way to refute criticism, namely, to exhibit the professional success of his disciples. His silence did not mean lack of confidence in his method; far from it." Eliot, *supra* note 8, at 523. As a result,

Professor Langdell was not disposed to defend himself or his invention by argument against hostile criticism. He would not even argue on the subject with members of the governing boards or members of the law faculty. He was satisfied to leave the necessary current defenses and persuasions to President Eliot, and to await the verdict of the legal profession on the success of his disciples at the bar. Professor Eliot supported Professor Langdell's methods and measures with all his might; and the occasions were few on which these two men did not completely agree on any action either of them proposed.

Fessenden, *supra* note 8, at 516; see also Ames, *supra* note 13, at 12; Batchelder, *supra* note 8, at 441; Chase, *supra* note 11, at 338; Wambaugh, *supra* note 23, at 1.

61. See Fessenden, *supra* note 8, at 510-11 ("There was deep interest amounting to anxiety as to the number of students who would enroll in that coming year [1873-1874]. When it was found that it had increased from 113 to 138 there was a feeling of great relief.").

62. During Langdell's tenure as Dean, Harvard's situation ultimately improved dramatically.

Langdell was Dean of the Harvard Law School for twenty-five years, resigning his position in 1895. Under his administration the student body grew from 136 students in 1870-71 to 475 in his last year as Dean. The percentage of students who were college graduates increased from 47% to 75%. When Langdell came to Harvard the funds of the law school were small. When he resigned there was \$360,000 in investments and a \$25,000 cash surplus.

Stein, *supra* note 2, at 452.

63. *Id.* ("[G]raduates of Langdell's method proved to be very successful attorneys in practice.")

64. The situation was as follows:

Lawyers practicing in various parts of this country, and even beyond, sought the services of the students who had been developed in the School to aid them in investigating law questions. When from a lawyer in San Francisco a letter came asking urgently for the help of graduates of the School, Langdell was deeply gratified. Such facts, hardly appreciated at first save by extremely few, were to some extent the explanation of the increase. A young man who had faithfully and profitably followed the courses, could find a fairly lucrative position immediately after graduation. In after years this was well recognized. Furthermore, it was seen that graduates who started practice alone were successful in matters where legal research was required. Their opinions seemed sound and valuable. Briefs prepared by them were exhaustive and convincing, and recognized by courts to be of real assistance.

Fessenden, *supra* note 8, at 511. Fifty years later, President Eliot noted:

The number of students declined more than either of us had expected, and the demonstration of success achieved in prominent law offices and in practice by graduates of the School, who had enjoyed Langdell's sys-

Over time, Langdell's method became the accepted method of instruction at Harvard. As noted, colleagues were not easily converted. However, as they retired, Langdell transformed the faculty by replacing retirees with adherents to his method.⁶⁵ Some of his hiring decisions created further controversy. There was much criticism when he hired James Barr Ames, a recent graduate with no practical experience.⁶⁶ But Ames ultimately

tem and thoroughly utilized it, came more slowly than we had anticipated. On the other hand, that demonstration, when it came, was accepted by the legal profession with surprising readiness.

Eliot, *supra* note 8, at 522-23; see Brandeis, *supra* note 8, at 22-25; Stein, *supra* note 8, at 452 ("[T]he bar recognized the skill and abilities of his students.").

65. See, e.g., Batchelder, *supra* note 8, at 441 ("Professor Washburn, a man of great reputation and influence, universally beloved, resigned in 1876—the last survivor of the old corps."). As the "old corps" faded,

[t]he staff of instructors was augmented—men of the highest attainments, who refined upon the [case] system to a point undreamed of. Case book after case book appeared, not mere manuals of sailing directions for the voyager on the ocean of the law, but the buoys and beacons themselves, by which he may pick his way through the tortuous channels to a definite anchorage.

Id. at 442.

66. Fessenden, a student who graduated in 1873, witnessed the appointment of Ames:

Langdell came naturally to urge the appointment; for it was a result which followed naturally from his system of teaching. . . .

In June, 1873, while yet a student in the School, James Barr Ames was appointed assistant professor of law. This caused the most insistent remonstrance. A young man utterly inexperienced, who although admitted to the bar had never practiced law! It was unprecedented. Strong efforts were made to prevent confirmation. Happily they were unsuccessful. But so serious was the opposition and from such eminent and influential persons that it is most likely if assistant professorships had not been limited to the term of five years, the School would not have had the benefit of Ames's priceless services. To-day it is impossible to realize how there could have been any objection to this great teacher of law. To understand it, we must dismiss from our thoughts all he achieved after the summer of 1873, and also the successful teachings of the other young men who have followed him in this and other law schools. . . . In 1873 the feeling was dismay and grief.

Fessenden, *supra* note 8, at 511.

Of course, Langdell did not believe that prior experience in the practice of law was necessary. *Id.* at 512 ("He felt that there was need of an instructor who by his work as a student had shown that he thoroughly understood and believed in his method of instruction."). Despite the opposition, Ames was appointed. President Eliot noted, "Both the Corporation and the Overseers consented to this appointment with reluctance; and in all probability their consent was given only because the appointment was one limited by statute to a term of five years." Eliot, *supra* note 8, at 520. Fessenden concluded that the selection of Ames was fortunate. "This was a marked epoch in the life of the School. The subsequent wonderful success of this department of the university is well known. After condemnation, criticism, partial and at last entire adoption of his system, Langdell was entirely vindicated." Fessenden, *supra* note 8, at 512.

proved to be a skillful teacher, far more so than Langdell.⁶⁷ Within a decade, virtually every faculty member was using the case method,⁶⁸ and they were doing so in almost every course.⁶⁹

B. *The Case Method Assumes Dominance*

Eventually, other law schools began to adopt the case method.⁷⁰ The transition began slowly. In 1894, some twenty-five years after Langdell introduced the case method, the American Bar Association (ABA) reported that most schools still used the lecture method as the primary means of instruction and assigned a text rather than a casebook.⁷¹ Only six schools had fully

67. See Beale, *Professor Langdell—His Student Life*, 20 HARV. L. REV. 5 (1906) (Langdell was “[s]low of speech and with a hesitating manner”). Langdell’s teaching style did not exude confidence.

Again it was asked why Langdell did not give his own opinion, as the others did. It is true that he failed to express himself, although in the early stages of his teaching many questions were put to him in order to draw out an expression of his views. On these occasions he became absorbed in thought and seemed to falter. Usually he asked questions in reply. This occasioned harshest criticism. It was said that he did not answer because he did not know, that [other professors] *knew*, and therefore they replied.

Fessenden, *supra* note 8, at 501 (emphasis in original); *cf. id.* at 514 (reporting that Langdell was great teacher). His pupil, James Barr Ames, gave Langdell’s “system its success as a method of teaching.” Williston, *James Barr Ames—His Services to Legal Education*, 23 HARV. L. REV. 330, 332 (1909).

68. J. HURST, *supra* note 8, at 265; J. REDLICH, *supra* note 9, at 15-16.

69. See Parma, *supra* note 8, at 16.

70. Harvard’s status within the education community contributed to the method’s acceptance at other schools.

The case method went too far partly because of the prestige that was attached to it after the Harvard Law School began to prosper under it. Every law school that aspired to tell its constituency that it was as good as Harvard felt it necessary to announce that all courses were taught on the case system.

Hutchins, *supra* note 32, at 357; *see also* Wambaugh, *supra* note 23, at 3.

71. Henry Wade Rogers, chairman of the ABA Section of Legal Education, reported in 1894 that

[t]he lecture system is to-day the prevailing method of instruction at the University of Michigan and at the University of Pennsylvania, and is used in a limited degree in almost all of the schools. Of the three systems it is, perhaps, the least in favor, and in the large majority of the schools is only resorted to in special subjects. The text-book system seems to be the one most generally employed. It was used by Theodore W. Dwight at Columbia from the opening of that law school until the termination of his work as a law instructor. It has been the method favored at Yale, Boston, St. Louis and the New York Law School. The case system was introduced at Harvard by Professor Langdell in 1870. Until recently it has not been favored by other schools. The schools attaching the most importance to the system and making the most use of it at present are Harvard, Columbia, the Metropolis Law School in New York, Cornell University, Northwestern University and the Law

adopted the case method.⁷² But the case method was beginning to gain acceptance at other schools,⁷³ and faculty at those other schools were beginning to write their own casebooks.⁷⁴ At first, these books were nothing more than a series of cases bound together,⁷⁵ but they rapidly became more sophisticated.⁷⁶ By the

School of the Western Reserve University at Cleveland. . . . Very many of the law schools adopt no one method, but make use of all three.

Proceedings, *supra* note 15, at 404-05 (address of Henry W. Rogers). Another participant at the Section's annual meeting offered the following observation:

There are some five hundred gentlemen engaged in legal instruction in this country. Probably but a small majority have ever used some of these new methods of instruction; many of them because they hardly know how to begin with the work; there are many who have relied on the text-book system and never use the lecture system, and there are many who have never systematically improved the text-book system.

Id. at 381 (remarks of Austin Abbott); *see also* Tiedeman, *supra* note 26, at 150.

72. Proceedings, *supra* note 15, at 404-05 (address of Henry W. Rogers); *see also* Stein, *supra* note 2, at 452. In 1889, the Dwight method was still being used at Columbia. Dwight, *supra* note 45, at 145.

73. *See* Fessenden, *supra* note 8, at 516 ("As the years passed it was a satisfaction to both [Langdell and Eliot] to receive requests from other law schools for the temporary services of Harvard professors to exemplify the Langdell method of instruction, which was being adopted by them . . .").

74. A commentator later described the development of casebooks.

Until 1888, Langdell's and Ames' books were the only case-books in use in the American law schools. In 1885 Sir Frederick Pollock and Professor Finch of Cambridge visited Harvard. Impressed with the spirit and method of Harvard Law School, Professor Finch published a case-book on Contracts for the use of students in the English universities. In 1888 Gray published two volumes of Cases on Property, and Keener brought out a two-volume collection on Quasi-Contracts. Thayer published his Case Book on Evidence in 1892, and in 1893 Smith added a volume to Ames' Cases on Torts. . . .

The case-method now began to spread. Wambaugh introduced the [case method] in Iowa, and Keener at Columbia, thereby displacing the Dwight method at the place of its birth. . . .

At Harvard collection succeeded collection until every subject taught was covered. Langdell's influence was now felt throughout the United States. Other casebooks were published such as Huffcut and Woodruff's Cases on Contracts. The West Publishing Company began to issue the American Case-Book Series.

Parma, *supra* note 8, at 16.

75. *See* Proceedings, *supra* note 15, at 376 (remarks of Simeon E. Baldwin).

76. Mr. Baldwin summarized the development of the casebook as it had progressed to 1894.

Within the last ten years there has grown up a system of using cases by binding them in a book which was, at first, destitute of headnotes or of any arrangement discernible without great pains by any one except the man who made the compilation, and destitute of a table of contents or of a list of cases. By degrees that system has been changed and is being changed into a system of combining case and text-books in the schools where it is most used. Take as an illustration the excellent work by Professor Thayer, of Cambridge:—His 'Cases on Evidence,' or his 'Cases on Constitutional Law,' now in press. Are they cases or are they textbooks?

early twentieth century, a majority of the country's law schools had adopted the case method system in whole or in part; these schools included nearly all those of first rank.⁷⁷

C. *The Case Method Today*

Today, the case method is unquestionably the primary method of instruction in U.S. law schools. Every U.S. law school has adopted it,⁷⁸ and British law schools use it to varying degrees.⁷⁹ New forms of teaching, such as the problem method, have evolved from the case method, but they are consistent with Langdell's basic assumptions about how law should be taught. Students examine primary source materials, whether statutes or cases, and they are expected to reach their own conclusions about

. . . In other schools another system has arisen of printing cases from the reports, selecting occasionally important parts only of an opinion, giving, perhaps, the majority opinion and not the dissenting opinion, with head-notes, either those of the compiler or shorter ones prepared by the teacher, and with running headings to indicate in a word the main subjects of consideration, and those cases are printed in suitable form for use by the students individually.

Id. at 376-77; see also Farnsworth, *supra* note 37, at 906-09.

77. J. REDLICH, *supra* note 9, at 14 (quoting J. AMES, LECTURES ON LEGAL HISTORY 479 (1913)); see Batchelder, *supra* note 8, at 442; Fessenden, *supra* note 8, at 494 ("[Langdell's case method] has been pursued for many years by most American law schools."); Stein, *supra* note 2, at 452; Wambaugh, *supra* note 23, at 3 ("[L]eaving out of the account states in which there are no law schools at all, one might have traced for Professor Langdell a triumphal progress from the Atlantic to the Pacific, passing exclusively through states in which at least one law school professedly uses his system.").

78. Just after the turn of the century, the case method became the dominant teaching method. See Ames, *supra* note 13, at 13 ("In the last ten years his method has conquered its way into a majority of American law schools."); Boyer & Cramton, *supra* note 3, at 224; Fessenden, *supra* note 8, at 511 ("Langdell's system was adopted by professors and instructors, one after another, until it became the established method of instruction."). But see Kenny, *supra* note 16, at 188 ("[M]any of the less important law-schools still decline to adopt [the case method], and prefer the older methods of instruction . . . [T]eachers of law in the United States are still divided on the subject.").

The case method remains the dominant method today. See Blum & Lobaco, *supra* note 3, at 31 ("Since the turn of the century, the case method has become the dominant method of legal pedagogy throughout the nation . . ."); Currie, *supra* note 3, at 331 ("Langdell's case method . . . still sets the pattern for instruction in almost every course in every accredited [law] school."); Stein, *supra* note 2, at 452 ("[Langdell's method] still shapes legal education today.").

79. Sir Frederick Pollack introduced the case method at Oxford in the 1880s, but it was not well received. See Batchelder, *supra* note 8, at 442; Stein, *supra* note 2, at 452. Although the lecture method remains the dominant teaching method in Britain, the British have developed casebooks. See, e.g., T. WEIR, A CASEBOOK ON TORT (6th Ed. 1988). The debate within British law schools about whether the case method is preferable to the lecture method is similar to the one that took place when Langdell introduced the case method at Harvard.

how problems should be resolved. The professor's function is to stimulate student thought in a Socratic fashion.

The case method is so dominant that virtually all faculty use it, or a variant of it, and coursebooks are geared to it. New faculty intuitively gravitate to the case method. They do so even though most faculty enter law teaching from practice with little formal training in teaching methods or theory. There are a few post-graduate programs designed for those who intend to teach law, but few faculty graduate from those programs. From time-to-time, the Association of American Law Schools (AALS) sponsors a new teacher's workshop which focuses on teaching methods, but most law professors entered teaching without the benefit of this program.

Conversely, the lecture method is not well regarded as a way to teach law.⁸⁰ This fact reveals itself in many ways. At most law schools, one would have difficulty obtaining a teaching position if during the interview process he openly stated a preference for the lecture method. Junior faculty who consider other teaching methods may stick with the case method for fear of retaliation in the tenure process. Although faculty are free from such restraints once tenure is received, few alter their methods at this point. They have used the case method for many years and, because they received tenure, they have succeeded with that method.

Many faculty would be predisposed toward the case method whether or not these expectations existed. Law has been taught by the case method for so long that most of today's faculty experienced it as students. Because most of them prospered under the case method, as indicated by their generally outstanding law school performance, it is natural for them to use it when they begin to teach. Moreover, many faculty agree that the case method is the proper way to teach law.

If there is dissatisfaction with the case method, it manifests itself in the way faculty use it.⁸¹ Langdell viewed the Socratic

80. For a collection of differing views, see *Methods of Legal Instruction*, 1 YALE L.J. 139 (1892) (symposium); cf. Hammond, *supra* note 19, at 705 (report submitted in same year to ABA Section of Legal Education).

81. See Bye, *supra* note 4, at 1066 (referring to "decline of the Socratic method"); Landman, *supra* note 14, at 502-03; see also A. HARNØ, *supra* note 2, at 169 ("[M]ost teachers have lost their faith in the old dialectic case analysis as a legal philosophy, . . . [and] they have not been able to develop new teaching methods that will present the same stimulus to students . . . and at the same time avoid the philosophic limitations of the older [methods].") (quoting anonymous source) (emphasis in original); Morse, *supra* note 16, at 40.

Of course, the case method has never been used in an uniform fashion. An

method as an integral and necessary component of the case method.⁸² He tried to lead his students to greater insights by his questions. In modern law schools, there are few faculty who regard Socratic analysis, in its pure form, as an indispensable part of the case method. As evidence of this fact, one of my colleagues, who commented on an early version of this article, observed that I failed to differentiate adequately between the case and Socratic methods. Few faculty do nothing but ask questions. At most law schools, all faculty tend to lecture to some extent, and some faculty teach predominately by the lecture method. Some of these faculty are more practical than theoretical. One colleague told me that he focuses on the “nuts and bolts” of law and on showing students how to get things done.

But even those who prefer to lecture rather than use the Socratic format rarely abandon the case method altogether. While these faculty may lecture about cases or code provisions and ask only a few questions, they nonetheless assign a case or problem book and use a case or problem format. For political reasons, they might even refer to their teaching style as “quasi-Socratic.” Indeed, in recent years, many refer to their teaching style in this way. Why do faculty who prefer to lecture assign a casebook? Perhaps they feel that students must read the cases being discussed in order to get the most out of lectures, or perhaps they think that they have no alternative because coursebooks are almost invariably geared to the case method. Of course, those who choose to lecture could assign a text or hornbook as the required reading.

II. JUSTIFICATIONS FOR CONTINUED USE OF THE CASE METHOD

The case method's dominant position in U.S. law schools is a curious phenomenon. It has been achieved despite the fact that Langdell's justification for developing and using the method—his belief that law is a science that can be reduced to fundamental rules through scientific analysis—has long since been repudiated.⁸³ The case method's dominance has also been achieved

early twentieth century commentator noted that “the case system at Harvard is not a method or system of teaching. It is a system of studying law . . . As to the mode of teaching, there are as many as there are professors . . . We agree only in making cases, not text books, the basis of instruction.” Parma, *supra* note 8, at 17; see also A. HARNO, *supra* note 2, at 64 (discussing how faculty use hypotheticals to discuss problems before examining cases).

82. See *supra* notes 21-25 and accompanying text.

83. See Boyer & Cramton, *supra* note 3, at 225; Hutchins, *supra* note 23, at

notwithstanding much criticism,⁸⁴ which continues even today.⁸⁵

357 ("The case method threw tremendous emphasis on particular cases and particular facts, and created the erroneous impression that a science of law would eventually emerge from this mass of material."). Professor Grant Gilmore was one of Langdell's harshest critics. He dismissed Langdell as "an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius." G. GILMORE, *supra* note 13, at 42. Gilmore was especially critical of Langdell's belief that law is a science. "The jurisprudential premise of Langdell and his followers was that there is such a thing as the one true rule of law which, being discovered, will endure, without change, forever. This strange idea colored, explicitly or implicitly, all the vast literature which the Langdellians produced." *Id.* at 43; *see also* Frank, *supra* note 24, at 1313 (criticizing Langdell's "neurotic wizardry"); Landman, *supra* note 14, at 502, 504; Wizner, *What is a Law School?*, 38 EMORY L.J. 701, 709 (1989).

84. *See* Batchelder, *supra* note 8, at 442 ("The reviews teemed with articles attacking and defending [the case system]."); Childs, *supra* note 4; Gilmore, *Some Criticisms of Legal Education*, 7 A.B.A. 227 (1921); Kenny, *supra* note 16, at 187-88; Parma, *supra* note 8, at 16 ("Graduates [of Harvard Law School who had been taught by the case method and] thoroughly converted to the Langdell system took up the cudgels of its defense."); Smith, *supra* note 14, at 253; Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 586 (1987) ("The realists exposed the myth of underlying doctrinal principles and attempted to bring social science theory to the law schools."). One practitioner observed:

The gentlemen who are the products of the case system, so-called, brought into the office some more of intellect, somewhat greater confidence in their opinion, somewhat greater imperviousness to advice and suggestion than the products of the old system. I find students coming to me and laying down with confidence doctrines of the law for which I find no authority in cases, and which are wholly unknown to some of the leaders of the bar. . . . I cannot help feeling that whatever the method, there is still something to be desired in the manner in which law is taught.

Proceedings, *supra* note 15, at 379 (remarks of Moorfield Storey); *see also* Baldwin, *Teaching Law by Cases*, 14 HARV. L. REV. 258 (1900-01).

85. The case method has been criticized on a number of grounds. *See* Hutchins, *supra* note 23, at 357-58; Teich, *supra* note 45, at 171-72; Wizner, *supra* note 83, at 709-14. Some criticize the case method because it places too much emphasis on judicial decisions, through which it filters everything from the Constitution to statutes. *See* J. REDLICH, *supra* note 9, at 41. This problem has been alleviated today by the advent of so-called "code" courses, in which the primary focus is on a statutory code. Appellate decisions are still considered, but in an interpretive mode. But the problem remains in other courses. In constitutional courses, casebooks usually focus on judicial decisions interpreting the Constitution more than they focus on the Constitution itself.

Some criticize the case method because it tends to "sterilize" legal decisions, and to divorce them from their political and social contexts. As a result, students do not appreciate the meaning and significance of decisions. *See* J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 334-55 (1927); A. HARNO, *supra* note 2, at 142-44; J. HURST, *supra* note 8, at 265-66; Llewellyn, *supra* note 7, at 779. Background material in casebooks can remedy the problem, but such material has itself been criticized. *See* A. HARNO, *supra* note 2, at 68-70.

Another criticism is that the Socratic method focuses on training students to be advocates, and most lawyers do not function primarily as advocates in today's highly specialized environment. A lawyer might choose to work in the trusts and

Why has the case method survived? There is no clear answer. Perhaps the method took on a life of its own. Langdell experienced resistance to change when he introduced the case method; as his method became entrenched, resistance to change protected it. A more likely explanation is that faculty found new justifications for the case method. While few accepted Langdell's conception of law as a science, they felt that it was worthwhile for students to read decisions and to reach their own conclusions regarding the meaning and significance of those decisions. In addition, most faculty believed that it was undesirable to revert to the text and lecture method. They believed that students do not learn as much when they read expert commentary on judicial decisions or when they listen to a professor's lecture. Faculty were willing to trade off course coverage for Socratic discussion. This trade-off is inherent in the case method, an extremely time consuming and inefficient way to impart information. Legal rules can be stated much more quickly by the lecture method.⁸⁶ But, faculty accept this drawback for the advantage of having students undertake their own analysis.

Since Langdell's time, many justifications have been offered for teaching law by the case method. Some of these justifications are consistent with Langdell's conception of law, but most are inconsistent.

A. *Desirable Context for Learning Law*

One justification is that the case method provides a desirable context for learning law. Since judicial opinions involve real people mired in real controversies, they can stimulate greater student interest. Professor John Chipman Gray made this point.

The reading of text-books on a subject of which one as yet knows nothing is dreary work; a student is apt to

estates, tax or corporate areas, and may or may not venture into the courtroom. Moreover, non-advocacy skills may be as important, or even more important, to him than advocacy skills. *Id.* at 140-41. For example, a lawyer might serve as a "counselor, draftsman, negotiator and planner. In the complicated economic and social structure of our time, with its cross-currents produced by an overlapping of interests, it is the lawyer's forte to be guide and legislator in the solution of these problems." *Id.* at 141.

86. See A. HARNO, *supra* note 2, at 63; see also Hutchins, *supra* note 23, at 357 (case method not efficient way to "transmit a simple but important piece of information"); Keener, *supra* note 23, at 478; Kenny, *supra* note 16, at 190; Kocourek, *The Redlich Report and the Case Method*, 10 ILL. L. REV. 321, 324 (1915); Llewellyn, *supra* note 7, at 779; Loiseaux, *The Newcomer and the Case Method*, 7 J. LEGAL EDUC. 244, 244 (1954).

come from it into lecture with practically an empty mind. But we find that students, in reading cases, whether they approve, or disapprove, or are in doubt, or perplexity, yet come into lecture interested, and eager to express their views, or to have their doubts determined, or their perplexities removed.⁸⁷

Moreover, as one source of law, cases allow students not only to learn legal rules, but to see how those rules have been applied.⁸⁸

The Socratic component of the case method further enhances the learning process. Students can be asked to examine a decision from many different angles. For example, they might be asked to think about the limits of a decision. They might be asked whether, even though a court held a particular way on a given set of facts, might it hold differently on another set of facts? Students might also be asked to examine value judgments that influenced the decision. What motivated a court to reach a decision? What policy considerations did it mention? What unstated considerations may have been present? Are these considerations sound? Are other policy considerations more compelling? As students examine these questions in a classroom setting, with the opportunity for give and take among students and professors, they have the opportunity to gain many new insights about the decisions they read.

87. Letter from John Chipman Gray to the editors of *Yale Law Journal* (n.d.), reprinted in *Methods of Legal Instruction*, *supra* note 80, at 159. Gray went on to observe,

I think a professor sometimes fails to realize how very dull a text book is to students. He himself knows a good deal about the subject, the leading authorities are familiar to him, he is aware of the difficult and doubtful points, he probably has had a case involving them in practice, very likely he has lost his case, and perhaps his temper too; it is all very real to him, and so he takes up the text book, eager to see what the author has to say; whether he agrees with it or not, it is *interesting*. But to the students this background is wanting. The professor thinks "what an admirable, exact and lucid statement of these difficult and complicated topics, it is just the book for students; they cannot help finding it delightful." But the students, not having had any experience of the difficulties and complications, cannot appreciate the merits of the book; they are not delighted with it at all. They find it hard to keep awake over.

Id. at 160 (emphasis in original); *see also* Morse, *supra* note 16, at 42.

88. *See* Keener, *supra* note 23, at 482 ("While the student's reasoning powers are being thus constantly developed, and while he is gaining the power of legal analysis and synthesis, he is also gaining the other object of legal education, namely, a knowledge of what the law actually is."); *see also* Eliot, *supra* note 8, at 523.

B. *Teaching Students How to Read Cases*

Many praise the case method as a vehicle for teaching students how to "read" cases.⁸⁹ Lawyers must know how to analyze cases, and the case method provides a direct way of teaching that skill.⁹⁰ In order to read a case, a lawyer must be able to dissect it into its component parts: the relevant facts, the issue, the holding, and the reasons or justifications for the decision. The lawyer must also be able to determine a decision's scope and its place among existing precedent. Is it consistent with prior decisions? How does it affect existing precedent? What guidance does it offer for future cases? Is it likely to have broad or narrow application? Under the case method, students can be taught to recognize and confront these issues.

Under the problem variant of the case method, students learn to interpret statutes as well. Problem books are usually based on statutory codes. Students are asked to study these codes and to consider problems of construction. Through this process, students learn how to look for vagueness or ambiguity in a statute, and they consider how such vagueness or ambiguity might be resolved. Problem books also include cases that demonstrate how statutory provisions have been interpreted and applied, enabling students to learn case analysis in this context.

C. *Teaching Critical Analysis*

The case method can also be used to help students acquire critical analysis skills.⁹¹ This justification for the case method may be the one most cited by faculty, who often claim that students must learn how to "think like lawyers."⁹² What faculty mean is

89. See, e.g., Keener, *supra* note 23, at 481-82.

90. Nelson, *Dean Harno's "Ferment of Legal Education in the United States"*, 22 UMKC L. REV. 144, 153 (1953-54).

91. See A. HARNO, *supra* note 2, at 64 (citing Keener for importance of case analysis in development of reasoning powers); Doyel, *The Clinical Lawyer School: Has Jerome Frank Prevailed?*, 18 NEW ENG. L. REV. 577, 580 (1983); Fessenden, *supra* note 8, at 502 (Langdell "felt his own opinions to be of no consequence when compared with the importance of leading [students] to think and form their own judgments"); Keener, *supra* note 23, at 482 ("The student is required to analyze each case, to discriminate between the relevant and the irrelevant, between the actual and possible grounds of decision, and having thus considered the case, he is prepared and required to deal with it in its relation to other cases."); Kenny, *supra* note 16, at 188-89; Mack, *James Barr Ames—His Personal Influence*, 23 HARV. L. REV. 336, 337 (1909) ("[Ames] aimed not so much to impart information, as to develop the analytical powers of the men, to make them think as lawyers."); Teich, *supra* note 42, at 170.

92. See Spiegel, *supra* note 84, at 582-83; Stevens, *supra* note 23, at 507-08.

that students must learn how to analyze legal problems critically.

Critical analysis skills are essential to a lawyer. Lawyers must perform in a variety of contexts during their careers, and critical analysis skills are needed in many of these contexts. Professor W. Barton Leach noted that lawyers might be asked to assume "direction of all phases of the areas of personal conflict inherent in a complex society and economy. They must be advisers, negotiators, advocates, judges, arbitrators—and frequently administrators and executives having a large amount of quasi-legislative power."⁹³ He noted that lawyers might also be expected to "provide a very large proportion of national leadership at all levels of authority."⁹⁴ Of course, in recent years, lawyers have ventured into many new fields.⁹⁵

The case method provides a convenient way to teach students critical analysis.⁹⁶ Indeed, as time passed, even Langdell's

Many believe that this is the primary purpose of the case method. See Blum & Lobaco, *supra* note 3, at 31 ("[T]he case method purports to prepare students 'to think like lawyers' by having them dissect and discover the meaning of appellate court opinions through Socratic dialogue with their instructors."); see also Teich, *supra* note 42, at 170 (advocates of case method contend that it "best teaches the inductive method used by the lawyer to discern the law and so best directly teaches the most critical lawyering skill—the ability to think like a lawyer").

93. Leach, *Property Law Taught in Two Packages*, 1 J. LEGAL EDUC. 28, 29 (1948) (emphasis omitted).

94. *Id.* (emphasis omitted).

95. Professor Leach believed that students should be trained to have "fact consciousness; . . . a sense of relevance; . . . comprehensiveness; . . . foresight; . . . lingual sophistication; . . . precision and persuasiveness of speech; . . . and finally, and pervading all the rest, and possibly the one that is really basic: self-discipline in habits of thoroughness, and abhorrence of superficiality and approximation." *Id.* at 30-31 (emphasis omitted). A lawyer also needs to be flexible and versatile in his approach to legal problems. See A. HARNO, *supra* note 2, at 125. The case method, used in a Socratic fashion, helps students develop all of these skills.

96. Professor John Chipman Gray stated:

Many bright young men in school and college develop an extraordinary capacity for having other people's ideas pumped into them, and win rank and reputation thereby, but they have never intellectually "labored" in their lives. Our mode of study is a sharp break in their habits and traditions. The result is at first perturbing, often amusingly so, but it is invariably salutary.

Gray, *supra* note 89, at 160. A New York lawyer stated this advantage as follows:

The mind is not a receptacle to be crammed with unrelating chunks of information. The purpose of education is to teach the student to think. The power to think does not depend upon memory. What the student will need for his business or professional career is not scraps of knowledge. The possession of a lot of lumber does not make a carpenter. It is ability and skill in the use of tools which make a carpenter. Lumber is obtainable at all times. Skill in the use of tools is the result of handling them.

Smith, *supra* note 14, at 253 (quoting unidentified work by C.H. Terry); see also

disciples began to offer this as the primary justification for using the case method. For example, James Barr Ames, an early disciple of Langdell and his successor to Harvard's deanship, stated:

If it be the professor's object that his students shall be able to discriminate between the relevant and irrelevant facts of a case, to draw just distinctions between things apparently similar, and to discover true analogies between things apparently dissimilar, in a word, that they shall be sound legal thinkers, competent to grapple with new problems because of their experience in mastering old ones, I know of no better course for him to pursue than to travel with his class through a wisely chosen collection of cases.⁹⁷

Loiseaux, *supra* note 86, at 244-45; Teich, *supra* note 42, at 170 (advocates of case method contend it "forces students into the best possible learning mode—an 'active' learning mode").

Professor Christopher G. Tiedeman, writing in 1892 when he was with the Law Department of the University of the City of New York, argued that it was generally better to teach by the lecture method than by recitation. Recitation was simply too slow. The lecture method allowed the professor to proceed more quickly to deeper and more profound discussions. However, recitation was not necessary when students had well-trained minds. He believed that students in the United States needed the recitation. He stated that "the formal lecture is not suited for the ordinary American law school, for the reason that the average law student does not come to the law school with such a trained mind as a college course generally insures." Tiedeman, *supra* note 25, at 151. Tiedeman concluded that recitation was the method "best adapted to our present needs." *Id.*

97. J. AMES, *supra* note 16, at 364. Fessenden agreed:

Much has been said and written concerning Langdell's system. At the outset and for a long time it was misunderstood, and consequently not appreciated. We have been considering his course during the early years of his professorship. Although his title was professor, he was and is spoken of as lecturer, instructor, teacher. He was not at all a lecturer. He did not read or deliver discourse, prepared or unprepared; neither did he speak or read as with authority. To formulate or announce rules of law to be accepted by the students formed no part of his method. To say that he was an instructor in the usual sense of being one less in rank than a professor, is incorrect. If we use it within the meaning of one giving information by doctrine or precept, it cannot apply to him. He is best described as a leader or director of the thought of the learner, although leadership or directorship was hardly to be detected in his manner. He seemed to influence insensibly the mental working of the students, while he appeared to be, and indeed was, working along with them. He had the rare faculty of exciting them to do for themselves. . . . One quality was preeminent: he was inexorable in his search for the truth. Every phase of a question was examined. Of course among the men opinions were formed, suggestions made. But his way of testing the opinions expressed by the students was admirable. Reasons were given. Errors if existing were detected and disclosed. If, as rarely happened, he ventured a statement of his own, he

In Ames's view, students learn critical analysis by examination of "the best models that can be found in the history of English and American law"—in other words, leading judicial opinions.⁹⁸ Students also acquire these skills through class participation. The traditional Socratic method forces students to engage in critical analysis. They are required to analyze decisions in class under the scrutiny of their professors and peers.⁹⁹

*D. Developing Mental Toughness and the
Ability to Think on One's Feet*

Many students think that the case method is used to force them to think on their feet and to help them develop mental toughness.¹⁰⁰ Lawyers sometimes have to perform under difficult conditions. For example, they have to deal with questions from a judge, or argue against opposing counsel in a hearing. In these situations, lawyers have to think quickly and to respond immediately. By being forced to discuss and reason in class, with their

welcomed and encouraged inquiry and tests by the men with a pleasure which they knew was sincere. "That man never deceives himself. He cannot. His mind is absolutely honest," was a comment made during the year 1870-71.

Fessenden, *supra* note 8, at 513-14; see also Eliot, *supra* note 8, at 523.

98. Professor Ames believed that the primary objective of the case method was "the power of legal reasoning, and we think that we can best get that by putting before the students the best models that can be found in the history of English and American law." Proceedings of Association of American Law Schools Annual Meeting (Aug. 26, 1907), reprinted in 31 REP. A.B.A. 1010, 1025 (remarks of James Barr Ames).

99. Keener, *supra* note 23, at 482 ("The incentive for sound thinking, in advance of the exercise of the lecture-room, is the fact that his opinions are subject to review in the classroom, and will be made the subject of criticism by both the students and the instructor."). Many believe that the case method stimulates students to engage in independent thinking even without the prod of peer disapproval.

There could be no stronger proof of the excellence of this system of instruction than the ardor of the students themselves. Professor Ames, writing of the school ten years ago, said: "Indeed, one speaks far within bounds in saying that the spirit of work and enthusiasm which now prevails at the school is without parallel in the history of any department of the University." What was true then is at least equally true now. The students live in an atmosphere of legal thought. Their interest is at fever heat, and the impressions made by their studies are as deep and lasting as is compatible with the quality of the individual mind.

Brandeis, *supra* note 8, at 21 (quoting unidentified work by Ames).

100. Support for this statement was not scientifically obtained. Over the years, I have asked many law students and lawyers about why they think the case method is used. This is the most commonly given answer. Many responders have been unable to offer any other justification.

views subject to critical examination by their professors and peers, students are prepared for these situations.

E. *Learning Law in a System of Precedent*

Some argue that the case method is the only realistic way to learn law in a system based on precedent.¹⁰¹ A judge may announce a "rule" in a case. The opinion may even contain language that suggests the rule's importance¹⁰² and the necessity for applying it in future cases. But the rule's significance can only be ascertained by reference to how it is applied in subsequent cases. Is the rule followed or is it distinguished? Judges often distinguish or refuse to apply precedent. In so doing, judges are not necessarily violating principles of precedent or stare decisis. Rarely, if ever, is one case identical to a previously decided one. To the extent that there are differences, judges must decide whether these differences are legally significant and whether they justify a difference in result from a prior decision. Only as students examine the extent to which judges follow, distinguish, or avoid precedent can they determine the "law" in a given area.¹⁰³

F. *Understanding the Legal Process*

An important justification for using the case method is that it

101. Keener was an advocate of this view.

The advocates of the case system believe, to quote from the same authority, that "to make a general principle worth anything you must give it a body; you must show in what way and how far it would be applied actually in an actual system; you must show how it has emerged as the felt reconciliation of concrete instances, no one of which established it in terms. Finally, you must show its historic relations to other principles, often of very different date and origin, and then set it in the perspective without which its proportions will never be truly judged;" and that students should not be sent forth "with nothing but a rag-bag full of general principles, a throng of glittering generalities like a swarm of little bodiless cherubs fluttering at the top of one of Correggio's pictures."

Keener, *supra* note 23, at 480 (quoting unidentified address of Justice Holmes).

102. As Karl Llewellyn stated,

The art of reading, learned painfully as the new language of the law and the queer doctrine of holding and dictum are first met, is lost again in the first Spring It becomes too evident by Spring that not every word in most opinions repays real reading; and tricks of corner-cutting are picked up which displace worry.

Llewellyn, *supra* note 7, at 794.

103. See K. LLEWELLYN, *THE COMMON LAW TRADITION* 62-120 (1960); Oberer, *On Law, Lawyering, and Law Professing: The Golden Sand*, 39 J. LEGAL EDUC. 203 (1989).

can be used to teach students much about the legal process.¹⁰⁴ The rules and doctrine contained in legal precedent are an integral part of our system. But mere knowledge of precedent, doctrine, and rules does not enable a student to practice law. Law is not simply a deductive process. Sometimes judges work with clear-cut rules that lead them to a result. Often, however, no result is mandated. After analyzing existing law, judges have to exercise discretion in reaching a decision. In many instances, judges must engage in "law making" or "law creation."¹⁰⁵

The discretionary aspect of law can be revealed by the case method. United States Supreme Court interpretations of the Constitution are especially useful for this purpose. Most constitutional provisions, particularly those in the Bill of Rights, are phrased in vague terms. Thus, there can be uncertainty about what they mean and how they should be applied. For example, criminal procedure casebooks examine whether the exclusionary rule should be applied in state criminal proceedings. Because the Constitution does not address this issue directly, and other interpretive sources provide no clear answer, the Supreme Court has been forced to decide for itself whether the exclusionary rule should apply.

Understandably, the Court has taken conflicting positions on the issue. In *Wolf v. Colorado*,¹⁰⁶ it held that the Constitution did not require application of the exclusionary rule in state criminal proceedings. Twelve years later, in *Mapp v. Ohio*,¹⁰⁷ the Court reached the opposite result. Each decision produced dissents.¹⁰⁸ It is irrelevant for present purposes which opinion one agrees with; it is important simply to recognize that in both cases the

104. Professor John Chipman Gray recognized this advantage. He observed that the case system

accustoms the student to consider the law not merely as a series of propositions having, like a succession of problems in geometry, only a logical interdependence, but as a living thing, with a continuous history, sloughing off the old, taking on the new. The acquisition of this attitude towards the law is likely to be deemed of fundamental importance according as a professor is a believer in the common law. We are all here firm believers in [the common law]. We desire that the students may be filled with its spirit.

Gray, *supra* note 87, at 159.

105. See K. LLEWELLYN, *supra* note 103, at 24-25.

106. 338 U.S. 25 (1949).

107. 367 U.S. 643 (1961).

108. *Id.* at 672 (Harlan, J., joined by Frankfurter and Whittaker, J.J., dissenting); *Wolf*, 338 U.S. at 40 (Douglas, J., dissenting); *id.* at 41 (Murphy, J., dissenting); *id.* at 47 (Rutledge, J., dissenting).

Justices “made law” in holding that the exclusionary rule did or did not apply in state court proceedings.

Judges also must exercise discretion when they construe statutory or regulatory provisions, such as the Uniform Commercial Code or the Internal Revenue Code. As with the Constitution, a statute's language may be unclear. Words are imprecise terms, and their meaning changes according to the context in which they are used.¹⁰⁹ Any codification, being a mere compilation of words, can suffer vagueness or ambiguity. As judges resolve these problems of meaning, they are forced to make law—just as they do in constitutional cases.¹¹⁰

In fact, all areas of law involve an element of discretion. Both the civil law and the criminal law employ vague standards that

109. Justice Frankfurter's observations on the nature of language are well known.

Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts.

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947); see also Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 289-300 (1935-36); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 (1958); Morgenthau, *Implied Regulatory Powers in Administrative Law*, 28 IOWA L. REV. 575, 584 (1942-43).

110. Morgenthau noted:

What administrative agencies and courts do when they interpret a statutory provision . . . is, therefore, not in essence, but only in the degree of discretion which the interpreting officer may exercise, different from what Congress is doing when it legislates under the Constitution, and from what the Supreme Court is doing when it interprets the Constitution. They all legislate by substituting specific, individualized rules for general and abstract rules and by thus creating rules of law which would not exist had they not been created by them; they all interpret by remaining, while legislating, within the limits of abstract, general rules of law. He who interprets of necessity legislates, and he who legislates of necessity interprets.

Morgenthau, *supra* note 109, at 585 (citation omitted); see Cohen, *The Process of Judicial Legislation*, in M. COHEN & F. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 359, 365 (P. Shuchman 2d ed. 1979); F. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 27 (1975); Corry, *supra* note 109, at 291; Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1898-99).

force judges and juries to exercise discretion. For example, many legal standards involve vague terms like *reasonable*.¹¹¹ How does a decisionmaker decide what is reasonable? Most judges try to act consistently with the so-called rule of law. Inevitably, though, their individuality affects their decisions. Even judges who try to decide cases in a neutral fashion are subject to unconscious influences such as their personalities, life experiences, beliefs and value structures.¹¹² Thus, the determination of "reasonableness" is not an entirely neutral decision.

Precedent may limit a judge's discretion, but it rarely strips a judge of all authority. Few cases arise that are identical to previously decided cases. Usually, there is some difference in the facts and some argument about whether prior precedent ought to be applied. Moreover, attorneys can "create" and emphasize distinctions between their case and prior cases by the way they develop the facts and apply precedent to those facts.¹¹³ Judges must then decide whether to accept these distinctions.

Judicial discretion may also be limited by legal rules and doctrine. But undue emphasis cannot be given to such rules. Many "rules" are not actually rules in the sense that they are binding. Some rules are, in fact, nothing more than justifications for decisions. In many areas of the law, courts use "principles" that are not intended to be outcome determinative. They are simply "guides" that a judge may or may not use as appropriate. These principles can be found in many different forms and include the

111. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283 (1965) ("reasonable" person negligence standard); *id.* § 822 (reasonableness standard in nuisance cases); RESTATEMENT OF THE LAW OF RESTITUTION § 1 (1937) (unjust enrichment); MODEL PENAL CODE § 2.02(c) (1962) (recklessness); *id.* § 2.02(d) (negligence).

112. See, e.g., *Miller v. Jackson* [1977] 1 Q.B. 966. Landowners sought injunctive relief to prevent the playing of cricket on adjoining property. There was evidence that cricket balls landed on the plaintiffs' house and in their yard, sometimes doing damage, and they were reluctant to use their yard while cricket was being played. On the other hand, the cricket field had been in use for some 70 years, and many people enjoyed it. The court refused to grant the injunction. In its view, the right of the cricket club to continue playing cricket on its cricket ground took precedence over the right of a householder to sit in his garden undisturbed. *Id.* at 981. Yet, one judge believed that the rights of the householder should take precedence. *Id.* at 987. He would have granted an injunction but postponed its effectiveness for one year to allow the cricket club to find a new field. *Id.*

113. See K. LLEWELLYN, *supra* note 103, at 84-87.

equitable maxims¹¹⁴ and the canons of statutory construction.¹¹⁵ Many writers have observed that these rules are inconsistent both facially and as applied.¹¹⁶ In the administrative law area, courts have a rule that they should defer to an agency's construction of its own regulations.¹¹⁷ This "deference rule" is often stated in very strong terms.¹¹⁸ An agency's interpretation of its own regulations is entitled to deference unless it is "plainly erroneous."¹¹⁹ But this rule is applied very inconsistently. Often, courts purport to defer.¹²⁰ When they do, they emphasize the importance of giving deference.¹²¹ But courts readily overturn administrative in-

114. See Stevens, *supra* note 23, at 477 ("I am old enough to recall the separate equity system, and . . . had to learn the maxims of equity It was a marvelous system—absolutely absurd, with the maxims more honored in the breach than the observance; but then how true is that of much that passes as legal education.").

115. See K. LLEWELLYN, *supra* note 103, at 521-35; F. DICKERSON, *supra* note 110, at 227-36.

116. See K. LLEWELLYN, *supra* note 103, at 521-35; F. DICKERSON, *supra* note 110, at 227.

117. See, e.g., *Northern Ind. Publ. Serv. Co. v. Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975) (court of appeals erred in rejecting agency's interpretation of its own regulations); *Ehlert v. United States*, 402 U.S. 99, 105 (1971) (court of appeals "obligated to regard as controlling a reasonable, consistently applied administrative interpretation"); *Thorpe v. Housing Auth.*, 393 U.S. 268, 276 (1969) (Housing Authorities must follow HUD requirements); *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945) (in interpreting regulation court must look to administrative construction).

118. See *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (deference required unless agency's interpretation "demonstrably irrational"); *Ehlert*, 402 U.S. at 105 (deference required if agency's interpretation "reasonable, consistently applied"); *Bowles*, 325 U.S. at 414 (deference required except when agency's interpretation "plainly erroneous or inconsistent" with language of regulation).

119. *Bowles*, 325 U.S. at 414.

120. See, e.g., *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 169-70 (1982); *Jewett v. Commissioner*, 455 U.S. 305, 318 (1982); *Blanding v. Dubose*, 454 U.S. 393, 401 (1982); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981); *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977).

121. On the issue of deference to an agency's interpretation of its governing statute, the Supreme Court has stated "deference to the Federal Reserve is compelled by necessity; a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views." *Milhollin*, 444 U.S. at 568. As the Minnesota Supreme Court observed,

How is a judge, who is not supposed to have any of this special learning or experience, . . . to review the decision of commissioners, who should have it and should act upon it? . . . It is not a case of the blind leading the blind, but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing, and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question. *Steenerson v. Great N. Ry.*, 69 Minn. 353, 377 72 N.W. 713, 716 (1897).

terpretations,¹²² sometimes by ignoring the deference rule altogether,¹²³ sometimes by invoking another, perhaps inconsistent, rule.¹²⁴

G. *Teaching Students About Lawyering*

The final justification for teaching by the case method accrues from the prior one. As students gain an understanding that the legal process is not purely deductive, they can appreciate the lawyer's function in that process. Lawyers engage in many different tasks. They advise clients about the possible legal consequences of an action; represent clients who have already taken action and face possible civil or criminal liability; engage in planning activities; establish corporations; and negotiate and draft contracts. In each instance, lawyers are being paid for their ability, skill, knowledge and judgment. But much more is required than a mere knowledge of legal principles. The only thing lawyers have to sell is themselves.

In litigation contexts, a lawyer's ability and skill are as important as his knowledge of legal rules. Professor Irving Younger once said that in a contest between a good lawyer and a bad lawyer, the good lawyer will always win.¹²⁵ While this is an overstatement, it has elements of truth. If judges have to decide questions of law or fact, and there is some room for the exercise of discretion, then attorneys can have an impact. At the very least, they can try to persuade judges to reach results that are favorable to their clients. In many cases, hard work and skill are rewarded. What seems to be an "impossible" case may seem less problematic when a good lawyer has had a chance to work with the facts

122. Compare *Ehlert*, 402 U.S. at 105 ("[W]e are obligated to regard as controlling a reasonable, consistently applied administrative interpretation . . .") with *Kraus & Bros. v. United States*, 327 U.S. 614, 622 (1946) ("Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague languages."); see also *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 712 (1980) (Marshall, J., dissenting) ("frequently voiced criticism that [deference rule is] honored only when the Court finds itself in substantive agreement with the agency action at issue"); *Community for Creative Non-Violence v. Watt*, 670 F.2d 1213, 1217 (D.C. Cir. 1982) (MacKinnon, J., dissenting); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.13 (1979); Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 3 n.18 (1983); Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 590 (1984).

123. See Weaver, *supra* note 122, at 590 n.22.

124. Compare *Ehlert*, 402 U.S. at 105 with *Kraus*, 327 U.S. at 620-23.

125. Younger, *Trial Techniques* (1978) (National Practice Institute Cassette Lecture Series).

and to develop arguments about how the law should be applied to the facts.

The case method can be used to enhance student understanding of the lawyer's function. Faculty can encourage students to think about how lawyers develop arguments. In a criminal procedure class, for example, a student might gain insight about advocacy by examining Supreme Court decisions on the exclusionary rule. Some students, offended by violations of constitutional rights, are inclined to argue that the exclusionary rule should be applied automatically whenever someone's constitutional rights have been violated. They believe that the government should not be permitted to make use of evidence obtained illegally. As students analyze Supreme Court decisions involving the exclusionary rule, however, they realize that their views, if submitted to the Court in a brief, would be summarily rejected. The current Court will not require exclusion unless to do so would deter future police misconduct.¹²⁶ In deciding whether to reverse, the Court will balance the benefits of exclusion against the costs.¹²⁷ Thus, lawyers must carefully develop their strategies. In an exclusionary rule case, a lawyer can mount a direct challenge against recent precedent, but the challenge is likely to fail. So, the lawyer might opt for a different approach. He might ask the Court to create an exception to recent precedent, or he might draw on that precedent in constructing his arguments (e.g., emphasizing the benefits and minimizing the costs of exclusion in his case).

Faculty can also show students the impact lawyers have in non-constitutional cases. For example, suppose that an attorney wants to overturn an administrative interpretation in spite of the deference rule mentioned earlier.¹²⁸ Unsure of how to accomplish this objective, he might begin by examining prior decisions to determine when the courts have overturned administrative interpretations. From this examination, he can determine which legal rules have been used to supplant the deference rule and construct his arguments accordingly.¹²⁹

126. See *United States v. Leon*, 468 U.S. 897 (1984) (good faith exception to exclusionary rule where application would not have deterrent effect on police).

127. *Id.* at 906-07.

128. For a discussion of the deference rule, see *supra* notes 117-24 and accompanying text.

129. For a discussion of the rules used to supplant the deference rule, see *supra* note 122 and accompanying text.

Faculty also use the case method to educate students about how lawyers function in non-litigation contexts. A client might seek advice regarding a proposed course of action. Whether the context is estate planning, business planning, or something else, the attorney must deal with statutes and judicial decisions. In these contexts, attorneys are often called upon to predict how statutes and decisions will be applied. This task requires skill and effort. One can never be certain how a court will resolve a problem of ambiguity, but an attorney can reduce the level of uncertainty by reading recent cases to ascertain how the courts have resolved similar issues. By doing so, attorneys can more reliably predict how the courts will decide a given question. In the classroom, students can be presented with hypothetical situations and asked how they would advise a client to proceed.

Of course, the problem method is a preferable way to deal with these statutory problems, and it has generally supplanted the case method in code courses. In such courses, students are taught how to "find" vagueness or ambiguity in a statute. They are also taught how to argue for or against particular interpretations, and they see how their arguments can influence the outcome of a case when the law involved includes vague terms. Students can also learn how lawyers predict the resolution of these issues for their clients. But the problem method incorporates many aspects of case analysis. Problem books use cases, and problem method courses usually incorporate Socratic analysis.

In addition to showing students the function of advocacy in the legal process, faculty can use the case method to help students develop their own advocacy skills. This can be done overtly by asking students to argue in favor of certain parties and against others.¹³⁰ It can be done more covertly by encouraging student

130. One faculty member accomplished this objective through a style of teaching that he referred to as the "adversary method." Oleck, *The "Adversary Method" of Law Teaching*, 5 J. LEGAL EDUC. 104 (1952-53). "It is based upon contest, or classroom argument of cases between the students, each of whom represents one of the opposing parties in any particular case." *Id.* He implemented this method in the following manner.

The instructor calls on a student to rise and to be counsel for Party A in the particular case, and another student to be counsel for Party B. Occasionally, where there are more than two parties in interest, several additional student attorneys are designated. All the students who are called on remain on their feet throughout the case. Each is supposed to represent the point of view of his party exclusively, and to be determined to win by any proper argument. The theory is that with each side conceding nothing save for purposes of economy of time, and with the instructor acting as the judge, the issues will become apparent, and

debate and criticism regarding the validity of decisions. The classroom provides an ideal setting for advocacy training because student arguments can be tested by the professor and other students. In this way, students get the chance to develop their advocacy skills in a controlled environment.¹³¹

III. ARE THE JUSTIFICATIONS SOUND?

Although many justifications have been offered for using the case method, the case method is not necessarily preferable to the lecture method or to other methods. Gray's point, that the case method provides an interesting and "real" context for learning law, has validity. But, at the same time, the case method suffers from a dose of unreality. Students are not gaining actual experience with real clients and real disputes. They are reading about disputes that have already been resolved, some decades or even centuries ago. It is true that in the absence of real clients, cases generally are more interesting and stimulating than a text, and students whose interest has been stimulated will learn more. During the first year, students can get quite intrigued by the cases they read and are often eager to express their views. This enthusiasm may carry over to a few upper-level courses or to a particularly interesting case. But student interest cannot be maintained at a high level for three years. Week after week, students are

the applicable law and theory will be developed and made clear. And with practically no exceptions, that is what had been found to result.

The instructor gives a preliminary statement of the facts, emphasizing the action or inaction of each party. Then the plaintiff party states his complete prima facie case, as a matter of law. The defendant answers, and issue is joined. At the conclusion of each party's argument the instructor clarifies and restates that party's argument briefly, where that is desirable. I realize that the statement of the facts by the instructor conflicts with the generally accepted view that students should be trained to state cases well. It is submitted that this conflict is more seeming than real, in actual classroom practice.

Id. at 105. In the author's view, this method offers many benefits.

The competitive aspect of the method is beneficial, as is the practice in thinking and arguing through a case while standing before an audience. But what the students seem to like best is the concentration of each participant on the winning of the case, as though he did not know what the decision had been. This, to their way of thinking, approximates the actuality of practice, and a client's point of view. The clarification of decisions and principles is taken for granted.

Id. at 106. Others have used a similar method. See Bryson, *The Problem Method Adapted to Case Books*, 26 J. LEGAL EDUC. 594 (1974).

131. See J. HURST, *supra* note 8, at 265 ("Compared with the spoon-fed dogma of the earlier text-and-lecture instruction, the case method won its spectacular success fairly. It gave qualified students a tough-minded and self-reliant craftsmanship in handling the materials they could find in the Reports.").

asked to read twenty to thirty pages a night for each class. The repetition leads to boredom and numbness.¹³²

Many of the other justifications for the case method are also valid, but suffer from similar problems. Law students need to learn how to read cases and statutes, they need critical analysis skills, and they need toughness and resiliency. But none of these skills takes three years to develop. Many believe that case analysis can be learned during the first year of law school.¹³³ As one critic has stated, "Law students must learn to read cases, but three years seems a little protracted for the process. A student who cannot read them after six months will probably never learn to do so."¹³⁴ This criticism is valid. Although few students enter law school knowing how to read a case or statute, most learn to do so in a relatively short time. Of course, many problem courses are taught only during the second and third years of law school. Because statutory analysis requires skills that are not developed in most first-year courses, it is appropriate to use this variant of the case method in at least some upper-level courses. Moreover, although the case method is particularly well-suited to some

132. See A. HARNO, *supra* note 2, at 139 (quoting 1944 AALS HANDBOOK, *supra* note 3, at 166.).

133. See Hutchins, *supra* note 23, at 357-58; Llewellyn, *supra* note 7, at 779; see also Clarke, *Incompetency and the Responsibility of Courts and Law Schools*, 50 ST. JOHN'S L. REV. 463, 465 (1976).

134. Hutchins, *supra* note 23, at 357-58 ("The widespread insistence on teaching everything by the case method cannot therefore be justified by the necessity of giving the student an equipment for finding and reading case law."). Jerome Frank stated:

I will be told—I have been told—that the law schools at most have but three short years to train lawyers, and that these years are already so crowded that there is no time to spend on the sort of first-hand material to which I have been referring. I am not at all impressed by such talk. For in most university law schools the major part of the three years is spent in teaching a relatively simple technique—that of analyzing upper court opinions, "distinguishing cases," constructing, modifying or criticizing legal doctrines. Three years is much too long for that job. Intelligent men can learn that dialectical technique in about six months. Teach them the dialectic devices as applied to one or two legal topics, and they will have no trouble applying them to other topics. But in the law schools, much of the three years is squandered, by bored students, in applying that technique over and over again—and never with reference to a live client or a real law suit—to a variety of subject-matters.

J. Frank, *Courts on Trial* 236-37 (1949); see Keener, *supra* note 24, at 149 (case method should be used for three years of law school, but students who don't master it in first year are "not intellectually fitted to pursue the study of law"); Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 666 (1935) ("[T]ext and lecture and reference to a case book to accomplish the information part of an upper class course . . . would free time for really working with the material . . .") (emphasis in original).

courses, e.g., constitutional law, it is difficult to deny that critical analysis skills, case and statutory analysis skills, or toughness and resiliency could be taught effectively if the case method were used in fewer courses.¹³⁵

Case analysis may be the only way fully to determine the law in a given area. In a system based on precedent, only by examining cases can one know the law, in the sense of ascertaining what the courts have done in the past and predicting what they will do in the future. But can one learn the law in this manner in the classroom? Only partially. In a classroom setting, students cannot thoroughly study each area of the law by the case method.¹³⁶ There are too many cases. In fact, they read only a few leading or illustrative cases designed to present important principles or doctrines. Students do not attempt to determine for themselves how consistently any given rule is applied. Most students rely on an author's statement, a hornbook, or other study aid which summarizes the law.¹³⁷

135. See Doyel, *supra* note 91, at 581-82. Many believe that the Socratic method is, in fact, used infrequently today in upper-level courses. See Byse, *supra* note 4, at 1064; Clark, *supra* note 15, at 127-34; Doyel, *supra* note 91, at 583.

136. Professor Christopher Tiedeman, one of Langdell's contemporaries, recognized this shortcoming.

[L]earning what principles of law have been given birth or have been more or less modified in a particular decision or set of decisions is not an elementary work which may be entrusted to beginners, or which law students, at least in the earlier stages of their professional training, may be expected to do satisfactorily to themselves and to their teachers. In the first place, the whole law or any appreciable part of it, on a particular subject, cannot be learned from the study of a few leading cases, but only from a very large number of cases. For example, in order to learn the law in relation to the requirements of the statute of frauds, one would have to read not a few cases, but thousands of cases. To teach law by cases . . . alone,—it would require an incredible length of time to teach even the elementary law.

Tiedeman, *supra* note 25, at 154-55; see also Clark, "Practical" Legal Training: *An Illusion*, 3 J. LEGAL EDUC. 423, 424-25 (1951) ("For with only three years available for the period of study, no faculty could sensibly hope to cover all the multitudinous problems of present-day law practice if the purveying of information or knowledge is the goal."); Kocourek, *supra* note 86, at 324-25.

137. "Casebooks," in the sense of a book containing nothing but cases, did not last long.

At first, for the convenience of the students, Langdell prepared casebooks—a practice imitated by his followers. The cases are excerpts from the reports, with the extraneous matter deleted, well classified and annotated by the editor. These casebooks replaced the textbooks at first but not for long as teaching devices. The law teachers had to do more didactic teaching of their subjects, and then the textbooks reappeared clandestinely and then publicly. . . .

In the last quarter of a century, the original type of casebook became obsolete. It has been replaced by "Cases and Materials." These

Detailed case examination enables students to better understand the law, the legal process, and the importance of advocacy skills. These are important objectives, but, once again, they can be accomplished in far less than three years. They also can be accomplished through the lecture method. For example, I had one professor in law school who used the Socratic method very little. Instead, he lectured using a case format and asked questions only rarely. His questions were always very easy, and he usually tipped the class off to the answer by the way he posed the question. Instead of forcing students to do the hard thinking about a case, he did it himself. He often thought out loud, arguing with himself, during class. Nevertheless, through his lectures he conveyed an understanding of the legal system and an appreciation of the judicial process and the art of advocacy. Thus, the lecture method does have some benefits. Students see how the professor analyzes legal problems. In addition, some students do not diligently prepare for class and are not active participants in the learning process. These students might learn more under the lecture method.

Despite these benefits, it is difficult to argue that the lecture method should supplant the case and Socratic methods. Many believe that students learn more when they are forced to think for themselves and that this learning has a more lasting effect.¹³⁸ If

books contain selected cases, abbreviated textbooks, and problems, as one would suspect from these titles.

Landman, *supra* note 14, at 504; *see also* Byse, *supra* note 4, at 1064.

138. William Keener articulated this view of the learning process.

How is it possible for a man to work out a difficult problem of any kind whose only preparation for the work consists in having had certain results stated to him, and certain illustrations of the meaning given him? Is it not our experience, all through life, beginning with childhood, that we understand most thoroughly and remember longest that which we have acquired as a result of labor on our own part? How many students will do independent thinking and critical reading while preparing twenty pages of Parsons on Contracts for a lecture? But suppose you take the same subject matter, and instead of giving him Parsons' treatment thereof, you put into the student's hands a few cases involving the principles, but contradicting each other in many particulars, and perhaps reaching opposite results. Can a student, capable of thought, fail to think, and, having thought, whatever his conclusions may be, will not the lecture that he attends, where he will have his conclusions either confirmed or questioned, mean more to him and produce a more lasting impression?

Keener Report, *supra* note 23, at 479-80. Although Keener conceded that the instructor could not convey information as effectively by the case method, he regarded this objection as insignificant:

Another objection which has been raised to the system is that it requires more time than the text-book system in which to cover the field

all faculty taught by the lecture method, students would have little chance to develop their own critical analysis and advocacy skills and might be forced to develop those skills on the job. Their first real test might come from a senior partner quizzing them about a case, or from a judge in a hearing. So, at most, an argument can be made for increased use of the lecture method.¹³⁹

IV. PROBLEMS IN IMPLEMENTATION

The potential benefits of the case method are not always realized. Some students never achieve an understanding of the legal system or the lawyer's role in that system. Too many believe that they are in law school to learn rules, and they prefer to do so by easy methods—Gilbert's, Emanuel's, etc. Too often, students fail to appreciate the discretionary aspect of law. As a result, they view law as a deductive process and believe that if they learn legal rules they will be adequately prepared to practice law.

Faculty often are distressed by these attitudes. They wonder why their students are obsessed with rules, and they are concerned that students have a limited view of law. Faculty often fail

of law. If this statement is to be taken as meaning that more topics can be touched upon in a given length of time under the text-book system than are considered in the same time under the case system, the statement is true. But if the statement is to be taken as meaning that in the same length of time more law can be mastered under the text-book system than under the case system, the assumption begs the entire question and is emphatically denied. The advocates of the case system believe that the system produces a lawyer more quickly than the text-book system, for the reason that, in their opinion, the powers of analysis, discrimination and judgment which have been acquired by the study of cases by the student before graduation must be acquired by the student of the text-book system after he has ceased to be a student and has become a practicing lawyer.

Id. at 487.

139. Karl Llewellyn discussed the strengths and weaknesses of the case method and the lecture method.

[T]hree things are obvious. The first is that the skills properly to be derived from case teaching are essential to every lawyer. The second is that the handling of all or the bulk of the inculcation of the rules of law by way of the case-class (which comes, before the third year, to deaden students' interest as much as in the first semester it stimulated that interest) is so costly in time as to make the amount of information acquired about the more important or typical fields of law definitely inadequate for any graduate. The third thing is that along with the so-called "case skills" there are many other craft-skills of the lawyer which the schools can and should impart both in theory and in practice.

Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 216 (1948). At the time, Professor Llewellyn was the chair of the AALS Committee on Curriculum that wrote the 1944 report cited *supra* note 3. See A. HARNO, *supra* note 2, at 168-69.

to realize that, despite their best intentions, they are responsible for student attitudes. During law school, undue emphasis is placed on black letter rules. Casebooks, hornbooks and treatises are often organized doctrinally. Classes and tests exhibit a similar structure, with questions often focused on rules. What are the doctrines and principles? Why do they exist? What do they mean? How are they applied? Would other rules be preferable? This focus on rules leads students to believe that rules are of paramount importance.

A. *Casebooks*

Casebooks are a major part of the problem. In some respects, casebooks have not improved markedly since the late nineteenth century. Even then, there were too many judicial opinions for students to review all of them systematically.¹⁴⁰ Thus, professors had to select decisions for their students.¹⁴¹ But which cases should be selected?

Langdell's position was shaped by his view of law. He preferred to view law academically and disdained its more practical

140. See J. HURST, *supra* note 8, at 264.

141. See *id.* ("Langdell's administrative accomplishment . . . rested on a rationalization which changed drastically under pressure of experience. By the late nineteenth century the printing press had already created a wilderness of reported judicial opinions.").

aspects.¹⁴² He strove to approach law as a science.¹⁴³ Just as a

142. For a discussion of Langdell's view of the law, see *supra* notes 26-38 and accompanying text; see also J. HURST, *supra* note 8, at 264; Chase, *supra* note 11, at 338; Currie, *supra* note 3, at 344. Frank noted:

[Langdell's] philosophy of legal education was that of a man who cherished "inaccessible retirement." Inaccessibility, a nostalgia for the forgotten past, devotion to the hush and quiet of a library, exclusion from consideration of the all-too-human clashes of personalities in law office and courtroom, the building of a pseudo-scientific system based solely upon book-materials—of these Langdell compounded the Langdell method.

Frank, *supra* note 24, at 1304. These traits were revealed in Langdell's practice. "Langdell was only the modest, quiet student, always in his office, always at work, living frugally, and outside his immediate professional circle unknown." Batchelder, *supra* note 8, at 439.

One of his later students recalled that Langdell was quoted as speaking of "a comparatively recent case decided by Lord Hardwicke," and he was believed to regard modern decisions as beneath his notice. In the subjects of Equity and Suretyship, which he was then teaching, one might have fancied from his list of cases that Lord Eldon was still on the woolsack and that America was legally undiscovered.

Beale, *Professor Langdell—His Later Teaching Days*, 20 HARV. L. REV. 9, 10 (1906). One commentator noted that, as a graduate student, Langdell "lived in the library by day, and still by night his lamp burned till near the dawning. He was indeed 'seeking the fountains' of the law. He browsed among the reports as a hungry colt browses through the clover. The yearbooks in particular enthralled him." Batchelder, *supra* note 8, at 439.

143. Cf. Batchelder, *supra* note 8, at 439 ("[Langdell] found at the very outset of court work that the acutest legal mind, unsupported by practical legal experience, is no match for the tricks of the legal sharper. . . . He flatly and finally withdrew from the courthouse and gave himself up to office work and research."). Even though Langdell's work was outside the courtroom, it was well regarded.

Constantly in the law library he there made the acquaintance of members of the bar, who though acknowledged leaders, were not quite at home on various theoretic or historic points they happened to stand in need of. Quickly they recognized his profound acquaintance with the reports, his unerring application of legal principles and his almost startling foresight. As quickly they began to employ him for the preparation of briefs, opinions and pleadings. He worked largely for the Hon. Charles O'Connor. He was unheard of by the rank and file of the bar, but when the triumphant advance of opposing counsel was turned to a rout by a sudden pitfall in the pleadings or an unexpected ambush in the argument, the well-informed would mutter, "D—n it, Langdell's at the bottom of this somewhere!"

Id. Other commentators have observed the profound effects of the shift from the law office to the law school.

The tradition that a law school education is all-sufficient has survived the partial expulsion of active practitioners from its staff. Furthermore, a law school, even when run by practitioners, cannot as a matter of fact duplicate the work of an office engaged in actual practice. Thus we are in a fair way of losing entirely the practical training secured under a practitioner, that was once assumed to be the only logical means of preparing students in Anglo-American law. Even its remnants are not usually regarded . . . as worth preserving, now that they have virtually preempted the entire field of legal education.

A. REED, *supra* note 2, at 48.

physicist or biologist might search for immutable scientific truths, law professors and their students should search for fundamental principles of law. Langdell believed that law could be simplified into a "comparatively few absolute rules."¹⁴⁴ Once "found," these rules could be categorized into doctrinal frameworks from which lawyers and judges could deduce the outcomes of cases. James Barr Ames commented on Langdell's approach.

He believed it to be the function of the lawyer, and especially of the teacher of law, to weld from the decisions a body of mutually consistent and coherent principles. To his mind there was but one right principle upon a given point, and if decisions failed to recognize it, so much the worse for the decisions.¹⁴⁵

In accordance with these ideas, Langdell's followers set about the task of systematizing the law into black letter rules.¹⁴⁶

Langdell's ideas about casebook preparation flowed naturally

144. Fessenden, *supra* note 8, at 506; see also Spiegel, *supra* note 84, at 581.

145. Williston, *supra* note 67, at 332.

146. Grant Gilmore suggests that this systematization was brought about not only by Langdell's attitudes but by the establishment of the National Reporter System.

The West Publishing Company, whose interest in jurisprudential theory I assume to have been minimal, thus made a contribution to our legal history which, in its importance, may have dwarfed the contributions of Langdell, Holmes, and all the learned professors on all the great law faculties. After ten or fifteen years of life with the National Reporter System, the American legal profession found itself in a situation of unprecedented difficulty. There were simply too many cases, and each year added its frightening harvest to the appalling glut. A precedent-based . . . system could not long continue to operate under such pressures.

The new generation of Langdell-trained law professors arrived just as the situation was becoming intolerable. Fortunately, one of the basic tenets of Langdellian jurisprudence provided the perfect remedy. That was the proposition that "the vast majority [of cases]—are worse than useless, for any purpose of systematic study." The earlier practitioner-oriented literature had served to draw the reader's attention to what cases there were. A principal function of the new academic literature was to draw the line between the correct cases and the vast majority of worthless ones. The string citations of the wrongly decided cases, which are to be disregarded, not infrequently outnumbered the parallel strings of corrected cases. . . . A third feature of the new literature was its quality of bloodless abstraction. The facts of cases were rarely stated in any detail and were almost never analyzed. The customary procedure was to state the correct rule, often in black-letter text, and then proceed to justify it in terms of high-level generalities. The supporting cases came in at the bottom of the page in typically factless string citations.

G. GILMORE, *supra* note 13, at 59-60.

from his conception of law. Students should read decisions that showed the development of fundamental rules, or illustrated their meaning and application.¹⁴⁷ Langdell stated that the "growth [of the law] is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied."¹⁴⁸

But what should be done about cases that were not faithful to the "fundamental" rules and principles of law? They should be ignored. In Langdell's view, only a limited number of cases were worthy of inclusion in casebooks. He stated, "The cases which are useful and necessary . . . bear an exceedingly small proportion to all that have been reported."¹⁴⁹ Why were only a few cases needed? Langdell suggested a number of reasons. First, he felt that many cases were decided incorrectly or were not sufficiently faithful to established principles: "The vast majority are useless and worse than useless for any purpose of systematic study."¹⁵⁰ Second, he was of the view that "the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension."¹⁵¹

Although an emphasis on fundamental principles is in some respects necessary, it was pushed to extremes. By refusing to include decisions that were not sufficiently faithful to the "fundamental" rules and doctrines, Langdell's casebooks depicted a very limited and inaccurate view of law. Too much emphasis was placed on legal rules and doctrine. The implication was that, in a given case, lawyers and judges were searching for the one true rule. This view ignored the realities of law. Decisions that do not adhere to fundamental rules are as much a part of the law as those that are faithful to the fundamental rules, and they must be considered if one is to understand the law. These other decisions have much to teach about the lawyer's role and function.

Modern casebooks have improved, but not enough. They still contain "selected" decisions, primarily from this country with

147. Fessenden, *supra* note 8, at 506.

148. C. LANGDELL, *supra* note 28, at vi; *see also* A. HARNO, *supra* note 2, at 57, 65.

149. C. LANGDELL, *supra* note 28, at vi; *see supra* note 146.

150. C. LANGDELL, *supra* note 28, at vi.

151. *Id.* at vi-vii.

a smattering from Britain, arranged in doctrinal fashion. For nearly a century, cases have been selected for many reasons: they were important to the law's development;¹⁵² they illustrate the purposes and policies behind the law; they stimulate student thought about whether a rule is sound or unsound;¹⁵³ or they demonstrate a rule's application. While doctrinal organization may be both logical and necessary, it contributes to the overemphasis on legal principles and the underemphasis on how lawyers really function.¹⁵⁴

Casebooks are also deficient because they are often composed almost exclusively of appellate opinions, even though in certain areas of the law, e.g., torts, contracts and property, most decisions are rendered by state trial courts and are never appealed.¹⁵⁵ Indeed, the vast majority of cases are never even tried. Many believe that small claims courts and other courts of limited jurisdiction do not apply precedent rigidly. Nevertheless, many casebooks do not directly address the activity that takes place below the appellate level.

Concentration on appellate opinions is also objectionable because they obscure the lawyer's role. The "facts" presented in an appellate opinion have been shaped and developed many times. Students do not see a legal problem in its raw form—as it was presented to the lawyer. They do not see what the lawyer did in terms of ascertaining and developing the facts.¹⁵⁶ They also do

152. Brandeis, *supra* note 8, at 19 ("Having gone over the ground which the student is to traverse, the teacher can, in the first place, aid the student by removing from his consideration the great mass of cases on the particular subject which bore no part in the development of the principle under discussion.").

153. As William Keener described the process of selecting cases for students' use,

[T]he attempt is made . . . to present the same principle from many points of view, as involved in the same or different facts, and as considered by different minds, and the decision may be good or bad in principle, and may or may not be recognized as law. The student is thereby forced not only to analyze cases, but to compare them, to discriminate and choose between them.

Keener, *supra* note 23, at 481-82.

154. See Wizner, *supra* note 83, at 709-14.

155. Until recently, authors were forced to use appellate decisions because trial court opinions were not available. Even today, they are less available than appellate opinions.

156. Harno, in his analysis of legal education in this country, drew the following conclusion.

What is perhaps the greatest weakness of a young law-school graduate is that he is inept in dealing with facts. In the inculcation of this skill, case instruction as employed in the law school falters. The appellate decisions the student reads have fact situations, to be sure, but they do not involve facts "in the raw" such as the lawyer must struggle with.

not see the lawyer's tactical decisions. Why did the lawyer choose to bring the case under certain legal principles rather than others? How did the lawyer decide which facts to present in relation to the law? This aspect of current casebooks is unfortunate. A lawyer has many opportunities to develop and present facts in reference to existing precedent. How well he performs this task has a very important, if not determinative, impact on the outcome of his case.¹⁵⁷ Yet, this crucial aspect of lawyering is partially concealed by appellate opinions.

Appellate opinions are also deceiving because the "facts" that appear in a decision are those that the judge chose to mention.¹⁵⁸ Judges who want to write persuasive opinions often em-

"The facts as reported in the published decision have often gone through a triple process of distillation: unorganized 'real' facts are reduced to the facts proved in court; the facts proved in court may be reduced still further to the facts appearing in the written record on appeal; finally the facts of the written record are reduced to the facts reported by judge or reporter in the published decision." The study of appellate decisions thus fails to bring home to the student an insight into the "blood, toil, tears and sweat" involved in the lawyer's labor over facts. Case reading does not adequately discipline the neophyte for this ordeal. As a consequence the common criticism of the young lawyer is that he has not been well taught to deal with facts.

A. HARNO, *supra* note 2, at 152-53 (quoting Preliminary Statement of the Comm. on Legal Educ. of the Harvard Law School 24 (1947)).

In 1913, attorney Albert S. Osborn, a member of the N.Y. City Bar, called for the creation of a "casebook on thought and reasoning." Osborn, *A Casebook on Thought and Reasoning*, 5 AM. L. SCH. REV. 534 (1925). He believed that fact analysis was an extremely critical aspect of legal process. "The finding, presenting, proving, discussing and interpreting of certain facts make up a large part, perhaps four-fifths or even nine-tenths, of trials at law, so-called." *Id.* at 535. He believed that lawyers were deficient in their ability to handle such facts. Many believe that there is little or no need to educate students about the real world of practice. See Leleiko, *supra* note 1, at 508.

157. See Llewellyn, *supra* note 138, at 658. Karl Llewellyn discusses an interesting survey.

[A] tentative questionnaire [was] circulated recently among fifty lawyers. The question was, as to a long list of legal activities: From the angle of a client, but as knowing what *you* know, would you entrust to a person "of your experience" any one of the following matters? . . . The lawyers tried to answer honestly, despite certain ambiguities in the question (no mention of general skill, or of time available for research, etc.). The highest item found, out of the 50 questioners, 37 positive responses. The great bulk of lines of inquiry found no single lawyer-answerer who was ready to risk turning a case over to his equal.—No. Law is not simple. Well, then, is it no part of a law *school's* job to wrestle with the complexity? Or with the troublesomeness of turning rules into sensible *action*?

Id.

158. See Oberer, *supra* note 103, at 203.

Proposition 1: In all of time there have never been two cases *exactly* alike.

phasize facts that support their positions and ignore or downplay other facts. Supreme Court opinions illustrate this tendency. In some cases, the majority and the dissent view the facts so differently that one might wonder whether the Justices read the same record.¹⁵⁹

Teachers of constitutional law and criminal procedure have perhaps the best casebooks for teaching law effectively. These casebooks focus on the decisions of a single court, and they contain dissents. They reveal to students that the interpretive process is not purely deductive. Students see that judges make policy, and they can detect how a judge's perception of policy influences outcomes. Students can also see that law is not static. The Supreme Court's attitude toward a particular problem can change over time. Indeed, the Court may initially decide a question one way and later decide it the opposite way.¹⁶⁰ Students can see how the Justices work with precedent, and how at times they distinguish, modify or overrule it.¹⁶¹ As students begin to see these things, faculty have the chance to show students the importance of advocacy and its role in the legal process.

The problem is that many students believe that the constitutional law area is aberrational. They fail to appreciate the fact that similar things happen in other areas of the law. Why? Part of the problem rests with the casebooks. Students do not examine all of the torts or contracts cases from a particular jurisdiction. They see a smattering of cases from around the country organ-

Why is this proposition so seminally profound? Because it articulates the truth that *your* case has never before been decided, that the cases more or less like it that have been decided are, at most, relevant. And you will never know what really moved those other courts to decision in those seemingly like cases. Not even by reading their opinions a dozen times. Indeed, the very reading may be misleading: You will never get all the facts in the record, much less those without. When a judge sits down to write an opinion in a case already, at least tentatively, decided, the judge becomes an advocate in support of that decision, and the ardency of the advocacy may vary inversely with the certitude of the propriety of the decision. This has obvious implications for the adequacy of the factual abstraction from the record found in the opinion.

Id.; see also Doyel, *supra* note 91, at 584-85.

159. Compare, e.g., *New York v. Quarles*, 467 U.S. 649, 656-57 (1984) (Rehnquist, J.) (establishing "public safety" exception to *Miranda*) with *id.* at 675-76 (Marshall, J. dissenting).

160. Compare *Mapp v. Ohio*, 367 U.S. 643 (1961) with *Wolf v. Colorado*, 338 U.S. 25 (1949); compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) with *National League of Cities v. Usery*, 426 U.S. 833 (1976).

161. Compare *United States v. Leon*, 468 U.S. 897 (1984) with *Mapp v. Ohio*, 367 U.S. 643 (1961).

ized in doctrinal fashion. If students had the opportunity to examine all of the decisions on a given subject from a given state, the discretionary aspect of judicial decisionmaking would be apparent. They would realize that law is not as cut and dried as the casebooks and restatements make it appear to be. In England, torts casebooks are similar to our constitutional law and criminal procedure casebooks. They focus on a single judicial system and include decisions from various lower courts and the House of Lords, the highest court. For this reason, it is easier to observe the law's fluidity, to examine how policy considerations affect the outcome of cases, to see how judges treat legal rules, and to notice how important advocacy is to the outcome of cases.¹⁶² Would not U.S. students observe similar things if they examined all of the torts cases from their home state?

Early in this century, some commentators proposed the creation of "local" casebooks.¹⁶³ For each subject of a local nature, a different casebook would be prepared for each state, using the cases from that state. In this way, students would learn the law of the jurisdiction where they would practice. But proposals for local casebooks ultimately had little impact.¹⁶⁴ Economies of scale dictated against them. In addition, many jurisdictions had so few

162. See, e.g., T. WEIR, *supra* note 79.

163. See Kales, *The Next Step in the Evolution of the Case-Book*, 21 HARV. L. REV. 92 (1907). Kales suggested that his proposal represented "the next radical step in the evolution of the casebook itself." *Id.* at 92. Kales contended:

[The Harvard Law School case-book] simply gives a foundation of general principles, leaving it to the student in practice to ascertain the local law. . . .

.....
The proposal now made is that the subject-matter of the case-book be so altered that it shall present a true picture of the present state of the law in a particular jurisdiction . . . with the same fidelity that it now gives us a correct understanding of the law of England prior to modern statutory changes, or of the law of that ideal jurisdiction which the compiler of the present Harvard Law School case-book has made for himself.

.....
... The plan proposed does not contemplate the slighting of either history or comparative law, but simply that these subjects be subordinated to the principal aim of ascertaining the present state of the law of a given jurisdiction. . . . The difference between what I propose and the present arrangement of the case-book is one of emphasis. *Id.* at 107, 110.

164. Kales's proposal generated much controversy.

Mr. Kales' paper brought forth much comment from members of the teaching profession, the consensus of opinion being that it was not possible to teach both the law of the land and the local law in the law school, and that it was far better to choose to teach the law of the land. Mr. Ames remarked that he would be extremely sorry to see Kales'

reported decisions that they would have been forced to use at least some non-local cases.¹⁶⁵ Thus, casebooks continued to be prepared for a national audience, with cases from many different jurisdictions.¹⁶⁶ The emphasis was on cases of national significance,¹⁶⁷ and no effort was made to review systematically the law of any given jurisdiction.¹⁶⁸

B. *Teaching Techniques*

Problems with current casebooks are not insurmountable. Faculty could teach students much about law and advocacy despite these deficiencies, but many fail to do so. Although law professors may hold a broader conception of the law, many (often unconsciously) encourage students to view law in a limited way. They focus on teaching students legal principles¹⁶⁹ and on illus-

"novel application of states rights, which would result in turning all the law schools in the country into local schools."

Parma, *supra* note 8, at 18 (quoting James Barr Ames).

165. See Kales, *supra* note 163, at 92.

166. Cf. Keener, *supra* note 23, at 481 ("Under the case system, however, the student is not referred to . . . an unclassified list of cases. He is, in fact, referred to a *few classified* cases, selected with a view to developing the cardinal principles of the topic under consideration.") (emphasis in original).

167. See J. Hurst, *supra* note 8, at 264 (case method demanded selecting comparative handful of opinions "which embodied the essentials of the law").

168. See J. HURST, *supra* note 8, at 264-65. Hurst explains this emphasis on cases of national significance.

Inherent in this [Langdell's] approach was a bold challenge to the extreme emphasis on peculiarities of local law, which had accompanied the apprentice training and the decentralized court systems of the mid-nineteenth century. The core of sound principles was the common inheritance of all the United States; the best English and American court opinions should be drawn on to illustrate the development of these principles, regardless of jurisdictional lines. A university law school should be a school in the Anglo-American legal tradition, and not the voice of a parochial sovereign. Herein, at least, Langdell's approach set an ideal of generous sweep.

Id.

169. Brandeis summarized the case method technique as it was used at the turn of the century:

In the class-room some student is called upon by the professor to state the case, and then follows an examination of the opinion of the court, an analysis of the arguments of counsel, a criticism of the reasoning on which the decision is based, a careful discrimination between what was decided and what is a *dictum* merely. To use the expression of one of the professors, the case is 'eviscerated.' Other students are either called upon for their opinions or volunteer them

Brandeis, *supra* note 8, at 20. Brandeis felt that this approach was acceptable: "It has been said that there are nearly three millions of distinct principles [of law]. This may be true; yet the fundamental principles are comparatively few. These only need to be acquired; once acquired, they will be found springing up everywhere." *Id.*

trating how those principles should be applied.¹⁷⁰ They may also ask students to examine policy considerations that have influenced the law. Thus, students will be asked whether a case was correctly decided. Did the court rely on sound policy considerations? What about other policy options?

In addition to the primary objective of teaching "law," many faculty have a secondary objective: to teach students critical analysis, i.e., to "think like lawyers."¹⁷¹ Presumably, they recognize the nature of the lawyer's role and are trying to prepare students for it. But many classes fail to reveal much about the lawyer's role in the legal process, and students do not learn how to think like lawyers. The focus is on the judicial process. What did the judge decide? Why did the judge decide that way? Should the judge have reached a different result?

Too few substantive classes give attention to the lawyer's role and to the importance of advocacy. How do lawyers develop and shape the facts? How do lawyers decide which legal principles to argue? How do they decide what facts to present in relation to applicable legal principles? How do lawyers use policy considerations to their advantage as advocates? Too often, faculty affirmatively conceal the lawyer's role in the legal process. Rather than showing students how advocates work with the law, faculty act as if there is a single correct answer to every legal problem. The goal of class discussion is to "find" that answer. This answer might be the one that the professor would give, that a court previously gave, or that is contained in a hornbook. Often, law is re-

170. I have asked many faculty why they use the case method. The most common response is that their primary objective is "to teach law." They define the term law broadly to include more than legal rules. Faculty also want students to understand the policies that led courts and legislatures to formulate the law in a particular way. See Brink, *Legal Education for Competence—A Shared Responsibility*, 59 WASH. U. L.Q. 591, 593 (1981) (Over the years, many legal educators openly stated "that the role of law schools was to train law students in the theories and substance of the law and 'how to think like lawyers' and was not to function as trade schools.").

171. Cf. Eliot, *supra* note 8, at 523-24. President Eliot described Langdell's objectives in the following manner:

He tried to make his students use their own minds logically on given facts, and then to state their reasoning and conclusions correctly in the classroom. He led them to exact reasoning and exposition by first setting an example himself, and then giving them abundant opportunities for putting their own minds into vigorous action, in order, first, that they might gain mental power, and, secondly, that they might hold firmly the information or knowledge they had acquired. It was a strong case of education by drawing out from each individual student mental activity of a very strenuous and informing kind.

Id.

duced to "black letter" rules.¹⁷² Faculty cite the restatements to demonstrate what the law is or should be, and they refer students to hornbooks, law review articles and other sources that contain legal "rules."¹⁷³

C. Examinations

Current examination methods are also part of the problem. Examinations were not required until the end of the nineteenth century. Once again, Langdell led the way by introducing the first written examinations at Harvard. Prior to this time, degrees were conferred on anyone "who had attended the School a certain number of terms."¹⁷⁴ A degree was, in effect, nothing more than a "certificate of residence."¹⁷⁵ Langdell required Harvard students to take written examinations designed to determine whether they had learned legal principles and knew how to apply

172. Cf. J. LANDMAN, *THE CASE METHOD OF STUDYING LAW* (1930). Landman gave the following description of how the case method could be used to reduce law to black letter rules or principles.

In the law class, the student is to be ready with the following cardinal elements for every assigned case—the salient facts, the issue, the decision, and the reasons therefor. The student's presentation may appear erroneous to the teacher. Then his classmates and the teacher participate in a general criticism, and the student is required to defend or amend his analysis of the case in question. The discussion is followed by a series of hypothetical problems presented by the teacher. Fact after fact is altered and at every point the student is required to weigh, for the purposes of decisions, the importance of each difference and resemblance. Various similar cases are contrasted to determine whether they are logically analogous. Conflicting decisions are subjected to rigid scrutiny and the very point of difference is ascertained. The student must ever be ready to give his own judgment and the legal reasons therefor. After the individual cases have been thus analyzed, the various threads of thought are woven together. The correct decision having been established for each set of facts the student attempts to formulate a principle which shall embrace them all. Up to this stage of the reasoning, the mental process has been inductive, and the classroom procedure has been Socratic. Induction is now followed by deduction and the formulation of the principle of law. The principle of law is then assumed to exist and the attention of the class is focused on its application to hypothetical cases and judgments are pronounced.

Id. at 23-24.

173. When students refer to these sources, they receive a deceptively simple view of the law. See Oberer, *supra* note 103, at 203. Oberer recognizes the deception inherent in the treatment of cases in legal treatises, encyclopedias, law review articles, etc. Because no two cases are alike, these resources "provide at best systems for categorizing cases—which, like people seen from a distance, look misleadingly alike." *Id.*; see also *supra* notes 154-59 and accompanying text (appellate opinions, and resources drawing on them, inadequate to reveal lawyer's role).

174. 2 C. WARREN, *supra* note 8, at 364.

175. *Id.*

them. A student in Langdell's class described Langdell's first examination in the following way.

The first year went along. His subjects were not completely covered. At the close the written examinations were held. Langdell's papers did not call for statements of the rules of law, but were designed to ascertain whether the students understood the principles sufficiently to apply them to supposed cases.¹⁷⁶

Langdell did not test for lawyering skills, because he did not view them as important.

Many modern law school exams are similar to Langdell's exams. Typically, faculty use two different types of questions. One simply calls for rule application; the other requires the student first to "spot issues" and then to apply rules to the issues spotted. Exams often are crammed with so many facts and issues that students, if they finish them at all, can do little more than identify the issues and state something about each. Many exams also contain questions that require students to reflect on policy issues.

The structure of exams undoubtedly has an important impact on student attitudes. Exam results affect career opportunities, and students attach great importance to them. Moreover, students treat examination questions as reliable indicators of how faculty perceive the law and what they deem to be important. If faculty give exams that demand little more than issue recognition and rule application, students are more likely to value and emphasize black letter law. If faculty place more emphasis on policy analysis or on advocacy skills, students treat law much differently.

Too many law school examinations focus on issue spotting and rule application. These exams can involve advocacy and require students to engage in policy analysis or to analyze questions of first impression. But does the average student perceive that law school exams call for more sophisticated levels of analysis? Recently, I asked students in my constitutional law and criminal procedure classes to fill out a questionnaire on the types of examination questions that they had encountered in law school. The overwhelming majority of students, all of whom were at least in their second year of law school, indicated that their exams had consisted of rule application and issue spotting questions. Few

176. Fessenden, *supra* note 8, at 506.

students indicated that they had taken exams involving first impression or policy questions.

These results were puzzling. Most faculty believe that their exams require at least some analysis and advocacy, rather than simply issue spotting and the regurgitation of black letter rules. Indeed, when I discussed the questionnaire results with other faculty members, most, including many who taught first-year courses, unequivocally stated that their examinations included policy questions. But, if that were so, then why did students not recognize this fact? Why did students perceive their exams so differently than faculty? Perhaps students do not realize that many questions, which are issue spotting in form, actually have a more sophisticated component requiring critical analysis. If so, why? Is it that students have so little time to answer the questions that they can do no more than spot issues? Is there a problem with how the exams are graded? Can a student get a "C" by identifying the major issues and stating the black letter law applicable to those issues, even though failing to address adequately the policy issues in the question? Do faculty only use the first impression and policy components to determine who should get a superior grade rather than to determine who should pass? If so, then it may be that a significant percentage of students never see the intricacies or complexities of a question, and therefore view their exams as calling for "black letter" law.

D. *Student Reaction*

Given the many cues suggesting the importance of black letter law, it is not surprising that students value it. It is equally understandable that students value study aids that treat law in an outline or black letter fashion. Students develop the belief that, for most cases, they will be able to find a single correct answer. It is the judge's role to find the right answer, to reject the wrong answer, and to do "justice"; the lawyer's role is limited. Although students recognize that there are cases of first impression requiring difficult judgments, they believe that such cases arise, by definition, infrequently. This attitude is apparent in students' questions. They often inquire about the law of their home state on a given point; they do not like issues for which there is no answer. They simply do not appreciate the important role "lawyering" plays in our system, where rules may be inconsistent, precedent distinguishable, standards vague, and facts marshalled and

developed.¹⁷⁷

It is not surprising, therefore, to find student discontent. Naturally, discontent may stem from many sources. Some faculty do teach poorly or abusively,¹⁷⁸ and some students are reluctant to speak in front of their peers and resent being called upon to recite. But discontent may be partially attributable to the fact that students do not understand the legal system and thus are unable to appreciate the benefits of the case method and Socratic analysis. Faculty often complain that students are unduly interested in learning black letter rules and are disinterested in critical analysis. But the interest in black letter rules is understandable—students are worried about their exams and they find comfort in viewing law as a series of rules that they can memorize and regurgitate. If they can only learn the rules, they believe, they can pass their exams and be effective lawyers.

These students are understandably impatient with the case method. If there is law to be learned, why do faculty not teach it? They regard hypotheticals with skepticism, suspecting their professors of “beating around the bush.” They doubt they will encounter these “supposed” situations, expecting instead to handle cases for which they can “find” an answer through examination of statutes or precedent. These students wonder why professors focus so heavily on policy or ask so many questions. What are the professors doing? Are they “hopeless academics” who live in “ivory towers”?

Faculty often dismiss student complaints summarily, claiming that students have not practiced law and are uninformed consumers. But many faculty fail to realize that they may be at least par-

177. Cf. Llewellyn, *supra* note 134, at 658 (noting “the emptiness of rules without the facts”); Oberer, *supra* note 103, at 203 (“In all of time there have never been two cases *exactly* alike. . . . This is the premise for sophisticated lawyering, but it is a rare law student who comprehends it, and an unrare practitioner who does not.”).

178. On the role poor teaching may play in student discontent with the case method, Dean Lee Teitelbaum has observed that one should distinguish between weaknesses which inhere in a method and those which derive from the (relative) lack of commitment, energy, skill, sympathy, experience or intelligence of the teacher or author. Perhaps the soundest basis for criticizing the Socratic method is the ease with which bad teaching can be masked: it *seems* easier to explain a poor class on poor student performance than is true of a lecture format. We also know, however, that this is not really so; the difference between a well-constructed class discussion and a series of questions that are ill-considered and go nowhere is not so subtle.

Letter from Dean Lee Teitelbaum, University of Utah College of Law, to Russell Weaver (Apr. 5, 1990) (copy on file with *Villanova Law Review*).

tially responsible for student attitudes. They want students to engage in critical analysis, but they fail to educate students about why such analysis is important. In addition, many faculty teach in ways that reinforce student attitudes regarding law. They give students subtle suggestions that black letter rules are important and should be valued. As a result, many students leave law school with a narrow conception of law.¹⁷⁹

V. CAN THE DEFECTS BE REMEDIED?

It is possible that the case method's day has passed and that it should be replaced by some new method. In the nineteenth century, Langdell's ideas profoundly changed the course of legal education. As we prepare to enter the twenty-first century, it may be time for another fundamental change. Of course, much change has already occurred. New methods have evolved and are used to supplement the case method. Moreover, many faculty have altered their use of the case method in an attempt to remedy existing defects. Some of these alterations have been in response to criticisms made by the Realists, the Crits, and others. Insofar as

179. Herma Hill Kay, former President of the Association of American Law Schools, summarized the situation as follows:

The organized bar, in particular, perceives the existence of a gap between the profession and the academy: one in urgent need of reduction, if not elimination. A dialogue has been underway for some time between the bar and the law schools over the fundamental question of how lawyers should be trained. Efforts at gentle persuasion meant to shape the law school curriculum in the direction of giving more attention to lawyering skills and the problems of professionalism have given way in some quarters to overt attempts at compulsion through regulation of the bar admission process. Generally, these more drastic efforts have been resisted by legal educators. Even some friendly critics believe that the gap between the profession and the academy is growing. Thus, Judge Harry Edwards warned us at the Annual Meeting in 1988 that, given the existence of "major structural problems that threaten to alter the basic fabric of legal systems . . . we can no longer afford law schools isolated in a world of their own."

Kay, *President's Message*, A. AM. L. SCH. NEWSL., Dec. 5, 1989, at 1. Earlier commentators agree:

Apprentice training stresses the practical skills. Its weakness lies in the fact that it offers little of education in the substance and spirit of the law. It is lacking in educational versatility, perspective and vision. Even so, we cannot ignore the fact that the practice of law is a skilled craft, and that in some of its phases it is an art. The lawyer must be more than a man learned in the law and related disciplines; he must be proficient in the skills inherent in the practice of law. The criticism that there is a gap between what the young lawyer learned in school and the skills demanded of him in the practice is a valid one.

A. HARNO, *supra* note 2, at 147.

the defects identified in this article are concerned, several remedies might be suggested.

A. *Educating Students About Goals and Objectives*

Initially, it is important for faculty to educate their students about the legal system and about their pedagogical goals and objectives. Faculty often blame students for their failure to understand the legal system and the objectives of a legal education. But this criticism is often unfair. When students enter law school, they encounter an alien environment. They may have spent much of their lives in school, but few have ever been taught by the case method.¹⁸⁰ Some students may have encountered the case method in political science or business classes. In some instances, their experience in those classes has given them an appreciation of the legal process and its discretionary aspects. But, in most instances, students will have gained a less than adequate understanding. Moreover, if a student's non-law school courses treated law in a black letter fashion, those courses may have excessively encouraged the student to view law in that way.

Despite the fact that law schools expect students to cope with a new field of study, using almost entirely foreign methods, few professors take the time to educate students about what they're doing or why they're doing it. Instead, a professor begins the first day of law school by asking a student to recite a case and proceeding immediately to ask questions about it.

Some law schools offer courses that are designed to educate students about law and the legal process, e.g., "Introduction to the Legal Process" or "Introduction to Law." But many of these courses fall short of their objective. Students do not take them seriously. Compared to the substantive courses that students take

180. See Landman, *supra* note 14, at 503. Professor Josef Redlich, in his report on legal education in this country, observed:

I am . . . positive that, if all first attempts are difficult, this is especially true of legal education according to the case method. Eminent professors of law have repeatedly explained to me that it takes a long time before the excellent effects of instruction by law cases are evident. The beginners are, as a rule, rather confused by what is demanded of them in class, and usually for a considerable period only the particularly quick or talented students take part in the debate; but after some weeks or months, things become clearer to the others also.

J. REDLICH, *supra* note 9, at 29. Redlich noted that "confusion and obscurity . . . —as is admitted by even the most zealous advocates of the exclusive case method—trouble[] most of the young men, . . . during a large part of their first year, in their attempts to analyze the cases." *Id.* at 44. For a discussion of Redlich's findings, see Kenny, *supra* note 16, at 191.

in the first year, the introductory course is "fluff." Assignment of junior faculty to teach the introductory course reinforces this perception.¹⁸¹ Moreover, the introductory courses are necessarily artificial. The most effective way to teach students about the law is in context. Only as students examine the law and see how judges deal with statutes and precedent, can they really understand how the system functions. Substantive material can be included in the introductory course, but treatment of it will often be superficial. It also may be duplicative. If faculty are teaching students about the legal process in substantive courses, an introduction to the law course is unnecessary.

Some courses in legal research and writing include material that provides an introduction to law. In these courses, some effort is made to give students an understanding of legal precedent and the legal process. But student interest in legal writing courses tends to be low, and this approach is even less likely to give students a deep appreciation of the law than an introductory course. Students are still more inclined to think of their substantive courses as the "real" courses. Once again, legal writing faculty tend to be more junior faculty who may have less of an interest in jurisprudence than they have in teaching students how to write legal briefs and memoranda.

The most effective way to introduce students to the law is in the substantive courses themselves, where professors have a powerful influence on students, especially first-year students. If these faculty explained to students what they intend to do and why they intend to do it, students would gain far more insight.¹⁸² Faculty could talk to students about a number of things. What is law? What is precedent? How rigidly do courts adhere to precedent? How do lawyers distinguish or avoid unfavorable precedent? What about statutes? Why do lawyers encounter problems of meaning? How do they resolve those problems? Faculty could then talk to students about what they will do in class and why. Class discussions could reinforce and illustrate these explanations. Why not give students this explanation? There is little rea-

181. Cf. *LAWYER EDUCATION AND LAWYER COMPETENCY* 13 (F. Dutile ed. 1981) (proceedings of National Conference on Legal Education, May 1979) [hereinafter *LAWYER EDUCATION*] (remarks of Dean Roger Cramton) ("There . . . is a tendency to relegate . . . [instruction] that involve[s] writing, personal involvement, role playing and the like either to extra-curricular activities, like moot court, or to non-tenure track faculty members.").

182. Cf. Pound, *Some Comments on Law Teachers and Law Teaching*, 3 J. LEGAL EDUC. 519, 523 (1951) (Professor John Chipman Gray would begin first-year property course with lecture on jurisprudence).

son to mystify law, the legal process, or the methods of legal instruction. The case method must stand or fall on its own merits. If what faculty do is sound, students can understand and appreciate its soundness. On the other hand, if the emperor has no clothes, then so be it.

Explanations to students could be made during orientation activities. Professor Karl Llewellyn lectured incoming law students at Columbia University about the legal process and what they should be learning in law school.¹⁸³ Use of the orientation period in this way has advantages. Incoming students are both excited and scared. They are inquisitive regarding law and law school, and they are worried about their ability to perform. This combination of factors makes them highly receptive to explanations of what will be expected of them in law school. Moreover, student attention is not diverted at this point by the demands of other courses. As a result, students are less likely to dismiss this introduction the way they dismiss introductory courses. The primary disadvantage to this approach, of course, is that given the students' stage of development, they may not be able fully to understand or appreciate the lectures.

B. *Classroom Reinforcement*

Any introduction to the law cannot be effective unless it is reinforced by actual experience in the classroom in substantive courses. These classes are the most appropriate place to educate students about law, the legal process, and the purpose of a legal education. If teaching is to be effective, however, faculty must consciously attempt to overcome the many suggestions of the importance of black letter law currently found in casebooks, traditional teaching techniques and examinations.

There is nothing wrong with teaching rules. They provide the framework within which lawyers function. Thus, questions designed to elicit rules, the same kinds of questions that have been used since Langdell's day, are legitimate. For example, students need to learn how to "read" cases. For this purpose, certain types of questions are relevant. What are the facts? What is the issue? What is the holding? What reasons did the court give for its holding? In upper-level courses, many of these basic questions can be omitted. The teacher can state the facts and holding, or can assume that the students have read the case and that they

183. K. LLEWELLYN, *THE BRAMBLEBUSH* (1960); see also J. REDLICH, *supra* note 9, at 42-46.

know it. Professors can then proceed to more sophisticated questions. What does the decision mean? Is it sound? Should the case have been decided another way? To what extent should this decision control in other, related factual situations?

To dispel the black letter notion of law, professors can blend other questions into the discussion. Did the court have to decide the case the way it did? Indeed, might the court have rendered the opposite result?¹⁸⁴ As students think about these issues, they learn much about the law. In a given case, the judge's decision might not have been compelled notwithstanding the existence of precedent. As students gain a better understanding of law, they can begin to appreciate the lawyer's role and to understand how attorneys influence outcomes. Hopefully, this understanding and appreciation encourages them to be inquisitive about how attorneys actually function. Faculty can stimulate student thinking on these issues by other types of questions. What caused the judge to decide the case this way? If the losing counsel had argued the case differently, might the result have been different? What arguments might have persuaded the court? What policy considerations might have been more compelling?

These types of questions help students obtain a much deeper understanding of law. They begin to understand that a decision's meaning and future application are not necessarily clear-cut or automatic. They can, instead, be affected by a number of factors, including how the case is argued. This understanding hopefully will lead students to consider what arguments a lawyer might advance to convince a court to extend a decision to other situations, or to discourage the extension.

Law teachers can demonstrate to students some of the techniques that lawyers use to avoid legal precedent. For example, faculty can prompt students to think about judicial attitudes and how to shape arguments in light of those attitudes. In constitutional law courses, students can be asked how they would argue a given case to the current Supreme Court. What arguments might the Court be willing to accept? Which arguments will it summarily reject? What does the Court's current attitude suggest about the validity of prior precedent? Faculty can also encourage students to think about how attorneys avoid legal rules. Certain

184. Cf. Pound, *supra* note 182, at 524 (Professor William Albert Keener was fond of asking students, "But suppose the Court had said the opposite?"). Questions of this nature force a student to think about whether a court was compelled to reach a decision, or whether it could have reached the opposite result. As students ponder such questions, they gain new insights into the law.

principles are stated in the form of rules even though they are applied inconsistently. As discussed earlier, courts are inconsistent in their application of the deference rule.¹⁸⁵ An attorney should contemplate what happens when courts do not apply the deference rule. What "rules" do they apply? What do they say about the deference rule? How can decisions avoiding the rule be used to advantage? As students ponder these issues, they learn how creative advocacy can achieve a client's objectives. For example, a number of attorneys in the late 1970s developed a new form of discovery called "contemporaneous construction discovery" in an attempt to avoid the deference rule.¹⁸⁶ They used this discovery to gather the information necessary to challenge administrative interpretations.¹⁸⁷ In many instances, they succeeded with these tactics.¹⁸⁸ As students see these things, they learn a great deal about the nature of advocacy.

There is a downside to providing students with a deeper understanding of law and the legal process. Some students become disillusioned when they realize that law is not purely deductive and that the outcome of a case can depend on how it is argued and who decides it. At that point, faculty must try to force students to the next stage of development. Is it desirable for the outcome of cases to depend on advocacy? Is that the strength or the weakness of our system? Faculty must also force students to consider ethical questions. How should judges decide cases? Is it proper for judges to have rules that are inconsistent or inconsistently applied? Is it ethical for lawyers to try to take advantage of this situation? Is a lawyer ethically required to do so?¹⁸⁹

C. *Encouraging Independent Thought*

Examination of these matters has an additional benefit: it encourages students to engage in independent thinking and analysis, necessary skills for the range of tasks lawyers perform. Many faculty try to create a classroom climate that encourages student thought and participation. Others do not.

Some faculty miss opportunities to encourage student thought. When a case seems wrongly decided, some faculty dis-

185. See *supra* notes 117-24 and accompanying text.

186. See Weaver, *Contemporaneous Construction Discovery: Its Use and Abuse*, 20 WAKE FOREST L. REV. 367 (1984).

187. *Id.* at 367-76.

188. *Id.* at 375-80.

189. See Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285 (1988).

miss it as incorrect or unsound. Others view such cases as an opportunity. Why did the court render this result? Students need to understand the human element of law. Although few judges consciously allow their values to affect their decisions, their values and attitudes necessarily play a role in the process. In addition, while some judges are good, others are not. Moreover, the quality of the attorneys in a case can affect the outcome. As students begin to understand that decisions result from a combination of factors, they gain an appreciation of the importance of advocacy.¹⁹⁰

Some faculty discourage or repress independent student thought. They act as if there is a "right" or a "wrong" answer to every legal problem. As a relatively new faculty member some years ago, I heard three experienced faculty members discussing what faculty should do if they were asked a question to which they did not know the answer. Two faculty stated that they would discuss the problem with the class and try to arrive at an answer. Then, they would do some research and present it at the beginning of the next class. The third faculty member, who had been teaching for many years, indicated that he had never encountered this situation. It was unclear what he meant. He may have meant that he had never been asked a question for which he could not provide some reasonable answer. But the tenor of his statement suggested that he had never been asked a question that he could not definitively answer. If he meant the latter, the statement is implausible. Faculty who are stimulating student thought should be asked difficult questions by their students. Thus, it seems somewhat strange that this faculty member had *never* been asked a question that he could not definitively answer. If so, he must be repressing his students with the fear of giving the wrong answer (one other than the one that he would give), rendering them unable or unwilling to ask creative or challenging questions.

Some faculty have developed techniques for encouraging in-

190. In recent years, many have argued that students should be taught values. Students enter law school with "ideals" and they want to advance "justice," but they often become disillusioned during their stay in the legal academy. The remedy, some think, is value-oriented education. See, e.g., Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 Nova L.J. 633 (1986). In many respects, these arguments are sound. Students should learn about the policy options inherent in a decision. They should, for example, discuss the pros and cons of a particular position. But it would be wrong for faculty to try to indoctrinate students with their own views. After law school, students may be asked to represent individuals whose interests are inconsistent with the professor's viewpoint.

dependent thought. One of the participants in the above discussion stated that he sometimes tells a student that he doesn't know the answer to a question when in fact he does. His objective is to stimulate and encourage students. After stating "I don't know," he commends the student for the question and then asks the class to examine the problem and seek an answer. Of course, only a very confident teacher would use this technique. Many law teachers, especially new ones, are afraid to give such a response. They fear that their students might think less of them.

An argument could be made for stating "I don't know" more often in law school classes, where this would often be the most intellectually honest. The outcome of a case depends on the existence of law and precedent, but it also depends on how the case is argued and who decides it. It is impossible to state with certainty how many problems will be resolved. Yet it would be equally dishonest for a faculty member simply to state uncertainty. After doing so, the faculty member should inform students about the existence of precedent and ask them to determine whether it is sound. Students can then be asked how the problem should be resolved. The faculty member might also encourage students to consider how they would try to convince the court to modify or distinguish the precedent.¹⁹¹

191. Faculty can also encourage independent student thought in other ways. Students sometimes ask questions which, on their face, do not make sense. Some faculty have a tendency to dismiss these questions or to answer them perfunctorily. But what seems to be a nonsensical question may actually have some logical basis. The student may have reached a conclusion but failed to explain how that conclusion was reached. If the faculty member asks a follow-up question, and finds out why the student asked the question, the question may turn out to be a good one. Indeed, it might even be creative. A particularly creative question is less likely to make sense on first blush.

Other techniques for encouraging student thought and participation are more subtle. Professor Irving Younger, in his trial practice series, described the *voir dire* technique called "bouncing." See Younger, *supra* note 125. Instead of asking each juror questions in order, he "bounces" around asking a question first of one juror and then another. He suggests this tactic for a reason. In *voir dire*, one objective is to "educate" the jury about the case. In order to educate jurors, they have to be attentive. If the lawyer "bounces around," asking questions at random, jurors do not know whether they will be asked a question next or not, and they tend to be more attentive. They do not want to embarrass themselves. This same principle can be applied in law school classes. If faculty ask questions of many students, but do not spend too much time with any one student or call on students in any particular order, students pay more attention in class and think more about what is being discussed. Students might also be more likely to have independent or creative thoughts and to express them. "Bouncing" is most effective if faculty make the effort to learn their students' names. The level of student attention is increased if faculty know their students. The faculty member can call on students more quickly and efficiently. Of course, these tactics can be threatening (the "hit list") and therefore can have a

D. *Examinations*

Faculty can also influence student attitudes with their examinations. To the extent that past exams have called primarily either for recitation of black letter rules or for issue spotting and rule application, professors can alter student perceptions by broadening the range of questions. Exams should test for the variety of skills necessary for good lawyering. One of these skills, of course, is a mastery of black letter law, and a sound exam should test for it. This can be done through traditional essay questions that call for both issue recognition and the application of black letter law. But this part of the exam need not involve essay questions. Instead, faculty might use multiple choice questions like those used on the multistate exam. They might also use a true-false, short answer format involving a statement of facts and a declaratory statement. Students could be required to indicate whether the statement is true or false and to give a brief explanation for their answer.

Other questions could require policy analysis. These need not be hidden in the middle of a complex factual situation cluttered with numerous other issues. The question might provide students with a simple statement of the policy problem, accompanied by some facts, and ask them to discuss how the problem should be resolved. Faculty could also include questions that require advocacy. For example, they could include a set of facts and ask students to make the best argument they can on behalf of one party.

negative effect. Usually, that is not the case. Students often appreciate it when a professor takes the time to learn their names. It brings a human element to the class. Even if this tactic is mildly threatening, it does not invoke a hostile student reaction absent other factors.

Another thing that can be done to improve the level of student thought and participation is to reduce the length of reading assignments. Faculty often complain that students are not well prepared for class and have not spent enough time critically analyzing decisions. In many instances, this criticism is unfair. Most reading assignments are so long as to preclude students from critically examining decisions. Many faculty ask students to read 20 to 30 pages a night. In other classes, students may have similar assignments. They may also have writing projects, clerking jobs, or other responsibilities. It is often difficult for students to read the material, much less to critically analyze it. Conversely, these same faculty who complain about the level of student preparation have ample time to prepare. Even a first-year professor will have a day or more to prepare for class. Faculty members who have taught the same class for many years have built up a wealth of knowledge and information, and should know much more than their students. By reducing the length of reading assignments, and by rigorously reviewing those readings that are assigned, faculty might obtain better preparation and analysis from their students.

By including a range of questions, faculty send a message that advocacy and policy analysis are not only important, but required. When a question consists solely of an undisguised policy issue, students cannot satisfactorily answer it without engaging in policy analysis. Minimal analysis generates a minimal grade. As a result, students quickly learn that policy analysis is an essential aspect of the course and of the study of law.

Faculty members who intend to use pure policy questions should inform students of their intentions. Ideally, students should prepare for their tests by studying black letter principles, examining policy considerations, thinking about the interrelationships between one part of a course and another, and thinking about possible gaps or omissions in the law. But not all students do so. A number of years ago, when I first started using such policy questions, the level of student performance was quite low. As I thought about the results, several concerns surfaced. Was the average student capable of handling more sophisticated policy and advocacy questions? Initial results were so disappointing that there were doubts. But did the fault lie with the students or the instructor? If students were used to taking exams that did not demand sophisticated policy analysis, could one expect them to perform well on such exams without advance warning? The next semester, I informed students on the first day of class that their exam would contain different types of questions, some of which would require policy analysis. This lecture had much effect; some students immediately dropped the course. Most remained, but they were more anxious about the exam than prior students had been. Since these students knew that they would be expected to engage in advocacy and policy analysis on the final exam, they prepared accordingly. They took notes differently and studied differently. Instead of nodding off or putting their pencil down when we began to examine policy issues, they were more attentive and continued to take notes. Of course, that was the goal. In that semester and in later semesters, it became clear that students who were forewarned were quite capable of performing well on sophisticated policy and advocacy exams. Students could refer to old exams to ascertain the types of questions that would be asked.

Advocacy and analysis questions need not take any particular form. The practice of one trusts and estates professor offers insight. In his class, he examined several statutes as well as many common law principles. On the final exam, he confronted students with a new statute that he had drafted for purposes of the

exam and required them to apply it to various factual situations. Many students felt that the exam was unfair, claiming that they should have been tested on the statutes and principles they had studied in class. In fact, the professor's new statute was not entirely new. It was based on statutes that had been examined in class. The professor's justification for writing a new statute was that statutes change over time and lawyers have to be able to interpret and apply new statutes. The changes that occur are never entirely new. New statutes usually evolve from prior ones, preserving provisions that function well and replacing provisions that cause difficulty. Changes are designed to remedy existing difficulties. Thus, if one has carefully studied prior laws, including their strengths and deficiencies, one should be able to interpret and apply new laws.

The bar exam, like law school examinations, also tends to reinforce student preoccupation with black letter rules. At the end of the last century, bar admission requirements were quite low.¹⁹² Over time, requirements became more rigorous, in part due to the efforts of the ABA.¹⁹³ Most states eventually began administering standardized examinations which included the multi-state bar examination.¹⁹⁴ To date, most bar examinations are rule-oriented and take a fairly black letter view of the law. The notable exception is the California performance-based exam. In most states, half of the examination involves multiple choice multi-state

192. See Lawson, *Some Standards of Legal Education in the West*, in Proceedings, *supra* note 15, at 423 (describing bar admission practice in Missouri); Proceedings, *supra* note 15, at 356 (remarks of Jerome C. Knowlton) ("In Indiana the constitution provides that any man can practice law who is a voter; it is not necessary that he should be able to read or write, simply that he shall be a voter.").

193. At its organizational meeting in August, 1878, the ABA decided that it should take a position on such issues as the preparation of "some plan for assimilating throughout the Union, the requirements of candidates for admission to the Bar." A. HARNO, *supra* note 2, at 73 (quoting 1 REP. A.B.A. 16 (1878)). Proposals were made, but rejected, for a "requirement of attendance on at least the studies and exercises appointed for said course of three years, as a qualification for examination to be admitted to the bar." *Id.* at 75. By 1892, the ABA was ready to adopt a similar proposal requiring two years of law study before admission to the bar. The ABA also encouraged the states "to make provisions when necessary for the maintenance of law-schools, and the thorough professional education of all who are admitted to practice law." *Id.* at 77-78 (quoting 15 REP. A.B.A. 9 (1892)). The ABA's Council on Legal Education, formed in 1917, had a very important impact on the development of legal education. See *id.* at 102-08.

194. In addition, many states began to limit or eliminate the authority of inferior state courts to admit new lawyers, and to vest the authority exclusively in the higher courts. Cf. Proceedings, *supra* note 15, at 352 (remarks of chairman Henry W. Rogers) (ABA recommended this practice in 1891).

questions designed to test knowledge of legal rules and principles, and the other half requires essay answers. The essay portion also tests basic knowledge and skills. Questions often are designed to test whether students can spot legal issues and whether they know the legal rules and principles applicable to those issues. Rarely do bar exams test for other legal skills or require sophisticated policy analysis or advocacy.

Should bar examiners demand more of their students? One would think that, because the bar is comprised of lawyers who work with the law every day and presumably understand the limits of doctrine, there would be a tendency not to give doctrinal exams. But they do. Perhaps this is due to the nature of a bar exam, which is to ascertain whether applicants are minimally qualified. Exams that call for issue spotting and require knowledge and application of legal rules are arguably adequate to make this determination. But bar exams could include a range of questions of the type suggested above for use in law schools. In this way, they would better test for lawyering skills. If the bar exam were altered in this manner, there would be a profound effect on legal education. Most students are concerned about the bar examination. If the exam does not require applicants to engage in policy analysis or to demonstrate advocacy skills, then it reinforces student beliefs in the importance of black letter rules. That is what the bar views as important. If bar examiners began to ask more of applicants, current law students would rapidly become aware of this fact and would begin to prepare accordingly. They would approach their law school studies differently.

VI. LIMITS OF THE CASE METHOD

Some limits of the case method are more difficult to overcome. As previously indicated, one of the major limits is that it affords students insufficient insight into how attorneys develop cases. Students read appellate opinions that involve cases already processed by both lawyers and judges, but they do not see legal problems in their unrefined form. Thus, they do not see how lawyers develop cases in terms of deciding which legal principles to invoke, developing and ascertaining the facts, and deciding how to present the facts in relation to the law. To some extent, these problems can be overcome. Earlier comments suggest how the case method can be used to help students develop an appreciation for the importance of developing and managing facts in the

presentation of cases.¹⁹⁵

Yet the case method may not be an effective way to teach these skills when it is compared against other methods. Students can, depending on how the courses are taught, learn much more about fact development and presentation in a trial practice course or discovery course. In addition, the problem method seems to be a more effective way to introduce students to this aspect of lawyering. Under this method, students can be given factual patterns and asked to analyze and develop them. If the problems are structured properly, students learn how to work with facts. In some respects this is done in many code courses. But there are problems with the way these courses are implemented. Problem books are organized in doctrinal fashion, and problems are "categorized" so that students know, from chapter headings and suggested code provisions, that the case involves a particular type of problem.

Undoubtedly, problems of this nature have many advantages. Students learn how to interpret statutes. Often, problems are structured to force students to consider problems of vagueness or ambiguity and to determine how those problems should be resolved. Professors can play off these variations by asking students how changing the facts would alter the result. At some point, though, students need to forge beyond doctrinal barriers. They need to see legal problems that have not been previously categorized and that do not suggest the issue involved. Why? The answer is obvious. When clients bring cases to lawyers, they rarely categorize them by stating, say, "This is a torts case involving conversion." Moreover, even when the client has previously categorized the case, the categorization may be wrong. Usually, clients come to lawyers with problems and state the facts as best they can. Lawyers must consider the facts, analyze the law, and decide on the best course of action. It is important for students to understand this aspect of lawyering while they are in law school.

Working with unprocessed factual patterns requires a level of doctrinal knowledge in several subjects. Students in certain upper-level courses are ready to deal with such problems. In a remedies class, for example, students can be given suitable problems. They might be given raw facts unaccompanied by labels such as

195. For a discussion of the case method and the importance of facts, see *supra* notes 156-61 and accompanying text.

“contract” or “tort.”¹⁹⁶ Students could then be asked to consider a number of preliminary issues. Might more than one cause of action be available? Might attorneys have discretion about how to characterize the action?¹⁹⁷ Then students can be asked to decide whether one characterization might be preferable.

As students analyze these problems, they can be encouraged to think about the many issues. What are the requirements of each cause of action? Are those requirements satisfied? Are there rules which require a plaintiff to use one cause of action rather than another? Do the actions provide for differing remedies? Which is preferable? Why? Students can also be encouraged to think about how “facts” affect their decisions. What facts are available? How might discovery effect your decisions? As you uncover more facts, might you be precluded from using one cause of action? Might you be encouraged to use another one?¹⁹⁸ This approach teaches students much about how lawyers develop cases.

On first blush, it would appear that problems of this nature could only be used in upper-level courses, because students must have some foundation before they can deal with law in this way. In order to work with legal rules on a sophisticated level, students must first learn the rules and understand how they are applied. But faculty can use similar problems in first-year classes, albeit on a less sophisticated level. Indeed, some first-year casebooks include problems.¹⁹⁹ Students first need to learn the underlying

196. For example, students might be told that a client, *A*, has come to them with a problem: “Yesterday, *B* stole my prize bull. It is worth \$20,000. What can I do?”

197. In regard to the problem set forth in *supra* note 196, students might be first asked to brainstorm regarding the possible availability of differing causes of action. Could *A* sue under the modern equivalent of conversion or replevin? Might he be able to seek injunctive relief? Might he be able to seek restitutionary relief? In what form? Would other causes of action be available?

198. In regard to the factual problem set forth in *supra* note 196, any number of factual variations might be presented. What would happen if: (1) *B* were insolvent? (2) *B* had sold the bull to *C* for \$50,000? (3) Before *B* sold the bull to *C*, he used the bull to inseminate five of his cows? (4) The artificial insemination produced no offspring? (5) The artificial insemination produced three calves? (6) Two of the calves were female and one was male, or vice versa? (7) *C* were wealthy? (8) The bottom had dropped out of the market for bulls? (9) The bull was now worth \$100,000? (10) *B* invested the money he got from *C* in a house? (11) Because of a favorable market, the value of the house immediately rose to \$200,000? (12) Instead of investing in the house, *B* invested the money in a restaurant which made him a little bit of money? Of course, even more variations are possible.

199. See, e.g., J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* (2d ed. 1981).

rules and principles, but, once they have, there is no reason faculty should not go further. Faculty might encourage students to think about related causes of action, sometimes crossing subject areas, that might be available in a given situation.²⁰⁰ They might also encourage their students to think about proof problems. How would they go about building their case? What type of evidence might be available? How might it be found?

Students can be taught to work with facts in other ways as well. In any substantive class, professors can use simulations. In a remedies class, some students might be asked to develop and present a request for a preliminary injunction. Other students might be asked to oppose the request. Problems can be as complicated as the professor desires and can draw on a range of lawyering skills. Such problems have many advantages. They make the class "real" and allow students to apply the principles they have learned. Students learn to develop and present factual data in the context of effective advocacy. In addition, problems force students to think more deeply about the substantive rules. Most faculty have experienced the phenomenon of sitting down to put their ideas down on paper, only to find that the writing process forces additional thoughts and insights. Students gain similar insights when they are forced to put legal theory into practice.

VII. CONCLUSION

Langdell's case method revolutionized the study of law. It displaced other teaching methods, particularly the text and lecture method, and ultimately became the dominant teaching method in this country. Given the simplistic and inaccurate view of law on which the method was based, faculty acceptance of it is in some respects surprising. In other respects, faculty acceptance could have been anticipated. As faculty altered their views of law, the case method became more, rather than less, relevant. It allowed them to teach students many things that could not be taught as well, or at all, by the lecture method.

Yet, the case method has never been able to divorce itself entirely from its nineteenth century roots. Modern legal educators have a much broader conception of law, and they recognize that lawyering skills can have an important influence on the outcome of litigation. Nevertheless, many faculty persist in teaching law as an academic discipline. Too little emphasis is placed on

200. See, e.g., the problem set forth in *supra* note 196 and the discussion thereof set forth in *supra* notes 197-98.

teaching students about how lawyers function and the impact they have on the outcome of cases. Indeed, many faculty prefer to maintain a clear line of demarcation between substantive courses and skill courses, treating them as fundamentally different. "Serious" faculty do not teach skill courses, nor do they respect those who do. Students do learn how to "think like lawyers" in substantive courses. But this is permissible since it is achieved as a by-product of the case method and results from intellectual discourse.

It is time for law to be studied in a more complete way. While there are legitimate distinctions between substantive courses and skills courses, the two need not be entirely divorced. Students must begin to understand and appreciate the lawyering dimension in substantive classes as well. Substantive classes need not be transformed into modified skills classes. That would be undesirable and unproductive, because students need to study law academically, to learn rules and doctrine, to understand the purposes and policies behind rules, and to think about their meaning and application. But students cannot fully understand a substantive area without some consideration of how lawyers and judges function. Students need to think about many things. How do lawyers distinguish precedent or convince a court to overrule it? How do lawyers find vagueness or ambiguity in a statute or administrative regulation? How do they convince a court to construe a provision in their favor?

Some may object that this approach to legal study is too litigation oriented. They may argue that few students become litigators. There is some validity to these arguments. Lawyers work in many different capacities. They serve as legislators, judges, litigators, advisers, lobbyists, planners, negotiators, and so forth. Nevertheless, in all these contexts lawyers must understand and appreciate the litigation process.²⁰¹ It is a necessary component

201. Cf. Brink, *supra* note 170, at 593 ("To those who say the purpose [of legal education] is to prepare legal scholars, judges, house counsel, public servants, and civic and business leaders, I say that the training of those students is also incomplete unless they have learned what a practicing lawyer must know."); see also Doyel, *supra* note 91, at 579. One practitioner related the following anecdote.

As I went into practice, law school had me very well-schooled to do research with a large firm and had me moderately well-schooled to argue cases on appeal, but did not have me schooled at all to talk to clients, to answer questions, or even to know what questions to ask. How embarrassing it was when I first went down to the District Clerk's office to ask, "How do I do so-and-so?" and was told, "Well, you need to ask a lawyer about that!"

of our system. It affects not only those involved in the litigation, but others as well. In order to plan or advise, the lawyer must predict the legal consequences of a particular action. In order to legislate effectively, the lawyer must understand and take into account how the system functions.

Of course, students need to learn about all aspects of lawyering, including non-litigation aspects. They need to learn how to plan, to negotiate, and to advise. In short, they need to learn to do all the things that lawyers do. Professors can attempt to teach students these skills in case courses. But some skills, such as those used in tax and estate planning, can be taught more effectively by the problem method. In short, it is unrealistic to think that the case method, by itself, can provide students with a complete legal education. That method is nothing more than a tool in the legal educator's arsenal. It is a tool that can be used effectively to teach many things. But legal educators must realize that it is only one method among many, and that it has many limitations.

LAWYER EDUCATION, *supra* note 181, at 38 (remarks of James E. Brill).